Supreme Court, U. S.
FILED
MAY 12 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 79-1802

HEWITT P. TOMLIN, JR.; HOMER H. WALDROP; ROY HALL; and DAVID R. FARMER, Individually and As Partners Doing Business Under the Name and Style of Waldrop, Hall, Tomlin and Farmer, a Professional Business Association,
Petitioners,

vs.

JOAN WOODRUFF; PATRICIA WOODRUFF HAMILTON; and LOUIS HAMILTON,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

No. 79-.....

HEWITT P. TOMLIN, JR.; HOMER H. WALDROP; ROY HALL; and DAVID R. FARMER, Individually and As Partners Doing Business Under the Name and Style of Waldrop, Hall, Tomlin and Farmer, a Professional Business Association,

Petitioners,

vs.

JOAN WOODRUFF; PATRICIA WOODRUFF HAMILTON; and LOUIS HAMILTON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Your petitioners above-named respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit sitting *en banc,* decided and filed February 21, 1980.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Tennessee was reported as *Woodruff v. Tomlin,* 423 F.Supp. 1284 (W.D. Tenn. 1976) and is printed as Appendix A. The original opinion by a panel of the United States Court of Appeals for the Sixth Circuit was reported as *Woodruff v. Tomlin,* 593 F.2d 33 (6th Cir. 1979) and is printed as Appendix B. That opinion

was vacated by the United States Court of Appeals after it granted petitioners' petition for a rehearing and a suggestion of rehearing *en banc*. The subsequent opinion of the United States Court of Appeals for the Sixth Circuit sitting *en banc* is not reported and is printed as Appendix C.

BASIS FOR JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit sitting *en banc*, was filed February 21, 1980.

This Court's jurisdiction to review the judgment in question is invoked pursuant to 28 U.S.C. §1254.

QUESTIONS PRESENTED FOR REVIEW

1.

Should a trial attorney be subjected to a suit for malpractice arising out of the judgmental and tactical decisions he must make in the planning, presentation and argument of his client's case to the trier of fact?

2.

If in Tennessee there can be no cause of action for malpractice against an attorney arising out of the manner in which he honestly chooses to present his client's case to the trier of the facts, can the United States Court of Appeals, in a diversity case from Tennessee, hold otherwise?

3.

When the only reported case on point in Tennessee expressly holds that, while there is no general exemption

for Tennessee attorneys against negligence in malpractice, "there can be no cause of action against an attorney arising out of the manner in which he honestly chooses to present his client's case to the trier of the facts," can the United States Court of Appeals, in a diversity case from Tennessee alleging attorney malpractice, hold that a trial attorney's judgmental decisions on the witnesses he interviews, the statutes he argues to the jury, and the parties he represents in the trial, may form the basis of a cause of action of malpractice against him?

4.

Can an attorney's alleged conflict of interest be the basis of a civil suit for negligence against him when there is no proof that the alleged conflict resulted in any damages to his client?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1332—Diversity of Citizenship; Amount in Controversy; Costs. (a) The District Court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs, and is between (1) citizens of different states . . . .

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938).

Tennessee Code of Professional Responsibility, 5(a) Tenn. Code Ann. at page 89:

> The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct.

STATEMENT OF THE CASE

The issue raised in this petition has been decided by the House of Lords in England, by the New Zealand Court of Appeals, by the Tennessee Court of Appeals, and in this case, by the Court of Appeals for the Sixth Circuit. Only the Sixth Circuit, in a sharply divided decision by an *en banc* court, has ruled contrary to petitioner's position.

The importance of this issue is evidenced by the four separate opinions filed by that *en banc* court: Judge Lively writing for a majority of four, Judge Weick concurring in part and dissenting in part, Judge Engel dissenting, and Judge Merritt dissenting.

The decision in this case, if left standing, will allow a jury to find a trial attorney guilty of malpractice by "second guessing" the judgmental decisions the attorney makes in the preparation and trial of his client's case. As such it adversely affects every trial attorney at the Bar; eliminates that attorney's independent role as an officer of the court and renders the trial attorney's judgment subservient to a client's whims; and thus seriously hinders the efficient and effective operation of the adversary system and disposition of trial cases.

This is a suit for attorney malpractice brought by respondents, former clients of petitioners, against petitioners in the United States District Court for the Western District of Tennessee. Jurisdiction in the trial court is based upon diversity of citizenship pursuant to 28 U.S.C. §1332. Tennessee law governs.

Respondents (plaintiffs below) brought suit against petitioners Hewitt P. Tomlin and his law firm (defendants below) who represented the plaintiffs in their personal injury suits arising out of an automobile accident occurring

May 22, 1968 on Highway 100 in Chester County, Tennessee. The facts of the accident were hotly disputed.

The plaintiff, Joan Woodruff, was a passenger in her father's automobile being driven by her sister, Patricia Woodruff, on a two-lane road in Chester County, Tennessee, when it was involved in an accident with a truck approaching from the opposite direction. After a trial which lasted more than a week, the jury rendered a verdict in favor of the defendants in the suits brought by the Woodruff girls. An appeal filed by Tomlin to the Court of Appeals of Tennessee, Western Section, was unsuccessful.

The Woodruff girls then brought suit against Tomlin and his law firm, alleging that they had negligently prepared, tried, and appealed the personal injury suits. They further alleged that Tomlin represented conflicting interests by representing both Joan and Patricia Woodruff (although he had been requested to do so by both girls and their parents), and that this "conflict of interest" had somehow caused them damages. (The girls' father, Charles Woodruff, carried liability insurance on his automobile, but this insurance excluded coverage for Patricia Woodruff in the event she was sued by her sister, Joan Woodruff, who was a resident of the same household. Therefore, had Joan sued Patricia, she could have collected nothing.)

When the malpractice case was tried in the United States District Court, District Judge (now Judge in the United States Court of Appeals for the Sixth Circuit) Bailey Brown eliminated the issue of conflict of interest from the trial, holding that no jury could reasonably determine that there was any proximate causal connection between the alleged conflict, if any, and the loss of the personal injury suit by the Woodruffs in state court. The Woodruffs alleged negligence on the part of petitioners in (1) failing to attempt either to change venue or to refile

the case in Federal Court; (2) failing to object to an allegedly erroneous jury instruction; (3) failing to consult a traffic reconstruction expert and use him as a witness at trial; (4) failing to interview and present available witnesses who might testify to important facts; (5) failing to bring to the attention of the trial court and jury certain Tennessee statutes bearing on the operation of motor vehicles in the state; (6) and negligence in the conduct of the appeal. The jury in the United States District Court disagreed, and a mistrial was declared. Petitioners' motion for judgment notwithstanding the mistrial was granted by the United States District Court, the Court relying upon a published opinion of the Court of Appeals of the State of Tennessee in the case of *Stricklan v. Koella,* 546 S.W.2d 810 (Tenn. App. 1976, cert. denied by the Supreme Court of Tennessee Feb. 7, 1977). That case held that, while Tennessee would recognize generally a cause of action for malpractice against attorneys, *"there can be no cause of action against an attorney arising out of the manner in which he honestly chooses to present his client's case to the trier of the facts." Stricklan v. Koella, supra,* at p. 814 (Emphasis supplied).

On appeal the panel opinion of the United States Court of Appeals for the Sixth Circuit reveresd the judgment of the District Court. See *Woodruff v. Tomlin,* 593 F.2d 33 (6th Cir. 1979).

Petitioners filed a petition for rehearing and a suggestion of rehearing *en banc.* The United States Court of Appeals granted the petition, vacated the panel opinion, and reheard the cause *en banc* with additional briefs. The Memphis and Shelby County Bar Association and the Tennessee Bar Association both submitted *amicus curiae* briefs in support of petitioners. The *en banc* United States Court of Appeals agreed with petitioners that the rule of *Stricklan v. Koella* controlled the cause through the re-

quirements of *Erie Railroad Co. v. Tompkins,* and required a dismissal of the charges of negligence in failing to obtain a change of venue, failing to object to the jury instruction, failing to consult a traffic reconstruction expert and negligence in the conduct of the appeal. The majority of a sharply divided court ruled, however, that, despite the clear mandate of *Stricklan v. Koella,* a jury would be entitled to decide whether petitioners were negligent in failing to interview certain witnesses whom the Woodruffs believed would be helpful to their cause; in failing to bring to the attention of the trial court certain statutes regarding conduct of motor vehicles on the highways; and in representing both Woodruffs in their suits against the other drivers. Curiously, the majority opinion is careful to point out that it does not hold that the statutes which Tomlin allegedly did not refer to the Court would be applicable to the facts of the Woodruff case. Nor does it hold that Tomlin should have called as witnesses the two individuals who were suggested as witnesses. Nor does the majority opinion, on the conflict question, convincingly face the exclusion in the insurance policy which would have precluded Joan Woodruff, the passenger, from recovering against Patricia Woodruff, her driver, even if suit had been brought by Joan against Patricia by another attorney.

Two judges of the United States Court of Appeals (one of whom was the only Tennessee member of the *en banc* court) strongly dissented from the majority opinion, contending that the case was controlled by *Stricklan v. Koella,* and that the judgment of the United States District Judge granting judgment n.o.v. for the defendants was correct and should be affirmed.

REASONS RELIED UPON FOR GRANTING WRIT OF CERTIORARI

I. THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, SITTING EN BANC, HAS DECIDED AN IMPORTANT STATE QUESTION IN A MANNER IN DIRECT CONFLICT WITH APPLICABLE STATE LAW.

A. Under Tennessee Law, There Is No Cause Of Action Against An Attorney For The Manner In Which He Honestly Chooses To Present His Client's Case To The Trier Of The Facts; In This Cause, However, The United States Court Of Appeals Failed To Follow Tennessee Law, Thus Violating The Mandate Of *Erie Railroad Company v. Tompkins* And Establishing A Dual Standard Of Liability For Tennessee Trial Attorneys.

This is a suit which attacks the manner in which an attorney prepared and tried a personal injury lawsuit. Since this is a diversity case from Tennessee, Tennessee law controls. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817 (1938). There is a Tennessee case directly on point which clearly and unequivocally holds that in Tennessee there is no cause of action arising out of the manner in which a trial attorney presents his client's case to the trier of fact. See *Stricklan v. Koella, supra,* at p. 813:

> However, none of the Tennessee cases that we find recognize a cause of action for alleged negligence in the attorney's choice of trial tactics or conduct of the cause . . . . We do not hold that there generally is no cause of action against an attorney for his negligence or malpractice; *we only hold that for the reasons given, there can be no cause of action against an*

attorney arising out of the manner in which he honestly chooses to present his client's case to the trier of the facts. (Emphasis supplied)

The United States Court of Appeals recognized *Stricklan* as the law of Tennessee and held that it should be followed. Inexplicably, however, it failed to follow that opinion on two matters directly related to the manner in which this trial attorney chose to present his case to the trier of the facts: the attorney's decision made as to which witnesses to interview, and the attorney's choice of statutes upon which to rely.

Grounding a malpractice suit upon the failure to *interview* certain alleged witnesses is clearly contrary to the *Stricklan* decision. In *Stricklan* the plaintiff-client alleged that his attorney failed to summon certain witnesses to his criminal case and failed to take certain depositions of alleged witnesses. *Stricklan* was decided on summary judgment, which would assume the truth of those assertions. The Court of Appeals of the State of Tennessee rejected those contentions, holding that they did not state a cause of action in Tennessee unless there was proof that the attorney acted in bad faith. The basis for the Court's decision is in great part centered on the proximate cause issue, the obvious inability of any malpractice jury to determine except by guesswork what the personal injury suit jury might have done had the witnesses been before it. In this case the United States Court of Appeals, it is respectfully submitted, ignored the direct mandate of *Stricklan* in holding that this allegation of negligence should be submitted to the jury. [The holding of the United States Court of Appeals becomes even more clearly erroneous when it is noted that the Court carefully points out (page 23 of its decision) that it does *not* hold that petitioner was required to *use* Burkett and McClendon as witnesses.] Surely, it is as much an exercise of judgment to decide

which witnesses to interview (who *may* have helpful testimony) as it is to decide which witnesses to call.

Further, note that the United States Court of Appeals acknowledged that petitioners' clients could not base a suit upon petitioner Tomlin's failure to consult, interview, and use a traffic reconstruction expert. (See Opinion of the United States Court of Appeals at p. 14.) It is anomalous indeed that the Court should hold that the jury could find legal malpractice in not interviewing two witnesses, but that there could be no malpractice in failing to interview a third.

It is hard to conceive of any more judgmental decision on the part of a trial attorney than a determination of which witnesses may possess relevant and helpful testimony. If attorneys in Tennessee or elsewhere are to stand trial for failing to interview any witness whom a client later conceives might possibly have been of some assistance in a losing cause, there will be no end to malpractice litigation. Such a ruling would be unjust, unfair and in conflict with applicable Tennessee law.

Likewise, the alleged failure to rely upon certain Tennessee statutes as a basis of liability in a personal injury case is clearly an attack upon a lawyer's judgment. The selection of a theory of liability is typical of judgmental decisions made during the preparation and course of a trial. Certainly the legal determination of the applicability of such statutes cannot be left to the jury. It is basic procedural law that it is for the trial court and not the jury to determine whether certain statutes are applicable to a particular set of facts. In the same opinion petitioner is erroneously faulted for failing to plead Tennessee Code Annotated §59-859 when in fact the record reflects that he *did* plead it. The trial court did not charge that statute, however; nor did it charge Tennessee

Code Annotated §59-854. The reason is pointed out by Judge Gilbert Merritt in his dissent at pages 46-47 of the Court's opinion: neither statute is applicable to the facts of the personal injury case. Where judges of the United States Court of Appeals disagree on the applicability of a statute, a lawyer should not be required to stand trial for malpractice because he came to the same legal conclusion as the appellate judge.

Both these decisions were judgment calls. They are made every day by every trial attorney in the heat of preparation and trial of a lawsuit. Judgmental decisions should not be the basis for a malpractice suit against the trial attorney by a disgruntled client. Tennessee law specifically holds that such decisions cannot be the basis of such a suit. The United States Court of Appeals failed to follow Tennessee law and must be reversed.

B. Tennessee Law On Attorney Malpractice In The Trial Of A Lawsuit Specifically Follows The Law Of England (Now Also Adopted By New Zealand) In Granting The Trial Attorney Immunity, Absent Bad Faith; The United States Court Of Appeals In This Diversity Case Erroneously Applied A Different Standard.

This Court should grant certiorari and address this very important question of a trial attorney's liability for the manner in which he presents his client's case. It is a matter of significant public policy and will bear very heavily on the effectiveness with which cases will be presented in the future. The singular importance of this issue has been acknowledged by the highest courts of England and New Zealand, which have both wrestled with this question. Both jurisdictions have concluded that the trial attorney must for public policy reasons be granted immunity from suit for the manner in which he prepares

and tries his client's case. This opinion of the United States Court of Appeals for the Sixth Circuit is the only case which holds to the contrary.

The worldwide landmark decision on this precise issue, specifically relied upon by the Tennessee Court of Appeals in *Stricklan v. Koella,* is *Rondel v. Worsley,* (1966) 1 All E.R. 467 (1966 C.A.), 3 All E.R. 657 (1967 H.L.), 3 All E.R. 993 (1969), 1 A.C. 191. *Rondel* holds that as a matter of public policy trial attorneys must be immune from liability for the manner in which they present their clients' cases. The policy reasons are sound, and are forcefully and articulately presented in that case.

See also *Rees v. Sinclair,* (1974) 1 N.Z.L.R. 180. In that case the New Zealand Supreme Court reaffirmed the *Rondel* holding and then extended the immunity for trial attorneys to pretrial work as well.

Likewise, see *Biggar v. McLeod,* (1977) 1 N.Z.L.R. 321. There the New Zealand Court again extended the immunity doctrine to actions by the trial attorney after the actual trial of the case for matters which were related to the trial.

No citation of authority is necessary to point out that judges are immune from liability for their own negligence. Efficient administration of justice requires that all parties to the trial, not only judges but jurors, witnesses, and trial attorneys concern themselves with the resolution of the issues at hand without being concerned about whether they might be sued by a disgruntled litigant in a subsequent civil proceeding. This Court should accept certiorari and reaffirm this important position by establishing it as an important precedent in American jurisprudence. It is essential to assure the continued effective operation of the adversary system and the commitment of a trial attorney to exercise independent judgment as an officer of the Court.

This Court has already held that state courts have the right to set their own standards of liability for trial attorneys:

> The narrow issue presented to this Court is whether federal law in any way pre-empts the freedom of a State to decide the question of immunity in this situation in accord with its own law. We are not concerned with the elements of a state cause of action for malpractice and need not speculate about whether a state court would consider petitioner's allegations sufficient to establish a breach of duty or a right to recover damages. Nor are we concerned with the question whether Pennsylvania may conclude as a matter of state law that respondent is absolutely immune. *For when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity unless, of course, the state rule is in conflict with federal law. Ferri v. Ackerman,* ..... U.S. ....., 100 S.Ct. 402, 406 (1979). (Emphasis supplied)

The State of Tennessee has set its standard, but the Sixth Circuit has failed to follow it.

The United States Court of Appeals decision in *Woodruff v. Tomlin* seriously erodes essential protections established in *Stricklan, Rondel, Biggar* and *Rees* and suggested by decisions of this Court.[1] This Court must correct that erosion.

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1. "Absolute immunity is thus necessary to assure that judges, *advocates*, and witnesses can perform their respective functions without harassment or imitation." *Butz v. Economu,* ..... U.S. ....., 98 S.Ct. 2894 (1978). (Emphasis supplied)

C. Under Tennessee Law A Trial Attorney's Alleged Conflict Of Interest Cannot Be The Basis For A Malpractice Suit Against Him; The United States Court Of Appeals Has Erroneously Held To The Contrary.

The United States Court of Appeals in *Woodruff v. Tomlin* was in error in ruling that the question of "conflict of interest" might be evidence of negligence which could be presented to a legal malpractice jury.

First, a determination by trial counsel as to which clients he will or will not represent is the most obvious kind of judgmental decision which falls within the aegis of *Stricklan v. Koella.* The doctrine of *Erie Railroad Co. v. Tompkins, supra,* requires reversal on this point alone.

Second, the Supreme Court of Tennessee has adopted the Code of Professional Responsibility for Attorneys and has also adopted the Code Preamble and Preliminary Statement, a portion of which is codified into Tennessee statutory law as follows:

> The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, *nor does it undertake to define standards for civil liability of lawyers for professional conduct.* Code of Professional Responsibility, Vol. 5A, Tenn. Code Ann., at p. 89. (Emphasis supplied)

Thus, applying Tennessee statutory law, the United States Court of Appeals should have dismissed the "conflict" issue in this cause.

Third and most important, there is no conflict of interest under the facts of this case. The record reflects that the policy of insurance insuring the Woodruff automobile contained a "member of the household" exclusion which would exclude coverage for Patricia, the driver, had she

been sued by Joan, the passenger. See in the record, Memorandum Pursuant to Motion for Correction or Omission under Rule 10E, Federal Rules of Appellate Procedure, p. 2. Therefore, had Tomlin not represented both passenger and driver and had suit been brought by passenger Joan against her sister Patricia, the driver, no damages could ever had been collected from Patricia even if a verdict had been rendered against Patricia, because there was no liability insurance coverage available to her under the policy on the Woodruff automobile. If *Stricklan v. Koella* holds nothing else, it clearly establishes that in order for a client to recover against his attorney for malpractice, the client must establish that, but for the malpractice, he would have won his case against the original defendant *and that he could have collected the damages from the defendant.* Assuming malpractice, the client can recover no greater verdict from his attorney than the amount of damages which he would have been able to collect from the original tort-feasor. *Sitton v. Clements,* 385 F.2d 869 (6th Cir. 1967). In the case at bar, because of the policy exclusion, Joan's theoretical suit brought by a theoretically different attorney than petitioner against her sister, Patricia, could have resulted in the collection of no damages whatsoever, no matter how high the verdict. Therefore, there could be no actual conflict between the sisters because one could not have recovered against the other.

This lack of an actual conflict is emphasized by the record in this cause, which reflects without dispute that Patricia remembered nothing about the accident, and that Joan's testimony at the trial completely exonerated her sister from any negligence in the operation of their vehicle. (See pages 8 and 38 of the Transcript of the original trial.) The only way a conflict could have been created was for Joan to change her testimony to place blame against her sister whose driving she had previously approved. Even

assuming a conflict existed, nowhere is it shown or suggested how the conflict affected the manner in which the case was tried or resulted in any damage to either of the sisters. The theory of the case adopted by the trial lawyer was purely a judgmental decision. As a matter of fact he made the decision with respect to each of two trials—the first having resulted in a hung jury and a mistrial. His judgment was certainly correct insofar as *some* of the jurors were concerned, as evidenced by the hung jury at the first trial.

The conflict question is a false issue. Judge Gilbert Merritt in his dissent in the *en banc* decision forcefully articulates this point. The majority opinion's view on the alleged conflict of interest question is erroneous and should not be allowed to stand.

CONCLUSION

The issues raised in this lawsuit are of most crucial importance to the trial bar. They raise policy questions which bear heavily upon the administration of justice in the trial courts of this Country. They have been considered important enough to justify consideration by the highest courts of England and New Zealand. The United States Court of Appeals for the Sixth Circuit has erred in its ruling and has, in so erring, established a very dangerous precedent. For the reasons set out above a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Petition for Writ of Certiorari have been served upon the following counsel of record on this the 9th day of May, 1980:

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APPENDIX

APPENDIX A

Joan WOODRUFF et al., Plaintiffs,

v.

Hewitt P. TOMLIN, Jr., et al.,
Defendants.

Civ. No. C-74-6.

United States District Court,
W. D. Tennessee, E. D.
Dec. 10, 1976.

Clients filed legal malpractice action against former attorneys. Following dismissal of the action as being barred by the statute of limitations, and reversal and remand by the United States Court of Appeals for the Sixth Circuit, 511 F.2d 1019, case was submitted to a jury, which was unable to agree on a verdict, and a mistrial was declared. Thereafter defendants moved for judgment n. o. v. and for dismissal. The District Court, Bailey Brown, Chief Judge, held that suit could not be maintained either on theory of negligence in preparation and trial of personal injury case or on theory of conflict of interest in representing both plaintiff driver and plaintiff passenger in suit against third persons, where it would be speculation to say that the alleged negligence or the alleged conflict of interest affected the outcome of the personal injury trial.

Judgment n. o. v. granted and action dismissed.

Attorney and Client (Key) 112, 113

Former clients could not recover against former attorneys for alleged legal malpractice in connection with prior

personal injury suit in which clients were plaintiffs, either on theory that lawyers were guilty of negligence in investigation, trial and appeal of the case, or on theory that there was conflict of interest in representing both plaintiff passenger and plaintiff driver in suit against third parties, as well as representing driver's insurer, where it would be speculation to say that the alleged negligence or the alleged conflict of interest would have affected the outcome of the personal injury trial.

Norman Herring, Phoenix, Ariz., James F. Schaeffer, D. Franklin Moore, Jr., Memphis, Tenn., for plaintiffs.

Leo Bearman, Jr., John J. Thomason, Memphis, Tenn., Victor F. Schneider, Jackson, Tenn., for defendants.

MEMORANDUM DECISION

BAILEY BROWN, Chief Judge.

This is a legal malpractice case in which damages are sought from the defendant lawyers for losing personal injury cases in a jury trial. Plaintiffs contend that the lawyers were guilty of negligence and other wrongdoing in the investigation, trial and appeal of the cases and that this proximately caused the loss. This court has jurisdiction on the basis of diversity of citizenship. This malpractice case was submitted to a jury, which was unable to agree on a verdict and a mistrial was declared. Thereafter, defendants moved for a judgment n.o.v. and for a dismissal of the case; briefs have been filed and argument has been had. This court concludes, for reasons herein set out, that the motion must be granted and the action dismissed.

The automobile accident out of which this litigation arose occurred in Chester County, Tennessee in 1968. At the trial in question, there was ample evidence to support

the following account of the accident. Plaintiff Patricia Woodruff, who was sixteen and had just obtained a driver's license, and her sister, plaintiff Joan Woodruff, who was fifteen, with their father's permission, had taken the family Chrysler to Chickasaw State Park on Highway 100. There they saw a friend, a young girl named Sterling, who also was driving a car. Both cars left the park at about the same time with the Woodruff girls behind the Sterling girl. Although Highway 100 is two-laned and is up and down hills, the Woodruff girls managed to pass the Sterling girl before the point of the accident which was one and one-half miles from the park. Just prior to the accident, when the Woodruff girls topped a hill, they saw a vehicle in front of them being driven by one Nobles headed in the same direction in their lane. Nobles was either stopped or moving very slowly and had his left turn signal on preparatory to turning into a side road on the left. Patricia Woodruff applied her brakes, put down a total of 252 feet of skid marks, which were initially on her right side and then on the left side of the highway. The car skidded sideways for a considerable part of this distance and came to rest with the front end off the left side and the rear on the highway. It did not strike the Nobles vehicle. One Pomeroy, an employee of one Teague, who was driving a loaded gravel truck in the opposite direction, struck the rear of the Woodruff vehicle. Sterling had to swerve to her right onto the shoulder of the highway to keep from being hit by the gravel truck, which had swerved to its left in an effort to avoid hitting the Woodruff car. The result was that both of the Woodruff girls received serious and permanent injuries, Joan receiving even more serious injuries than did Patricia.

The Woodruffs had their liability insurance coverage with the Tennessee Farmers Mutual Insurance Company, whose investigator was asked by Charles Woodruff, the father, who would represent them in behalf of the insur-

ance company. When he learned that the defendant Tomlin, a lawyer in Jackson, would do so, Woodruff called on Tomlin and employed him and his law firm to represent himself and his daughters in prosecuting any claims they might have. Tomlin learned that, according to the Woodruffs, Patricia Woodruff had been driving at a reasonable speed, that the Woodruff vehicle had been at rest for several seconds (five to eight) before it was struck by the oncoming gravel truck, and that, in any event, the Woodruffs, including Joan, did not want any blame to be placed on Patricia, the driver. Tomlin promptly went to the scene, took pictures, reviewed the investigation file of Tennessee Farmers, and filed suit for the Woodruff girls and their father against Nobles, Teague and Pomeroy. Pomeroy sued the Woodruffs for his personal injuries and Teague for the damage to the gravel truck.

The first trial in the Circuit Court of Chester County resulted in a hung jury, nine to three against the Woodruffs. At the second trial the jury found against the Woodruffs and in favor of Teague and Pomeroy. The verdict was approved by an experienced and able trial judge (who sat as a "thirteenth juror") and, upon appeal by defendants in behalf of the Woodruffs, the judgment below was affirmed by the Tennessee Court of Appeals.[1] Both trials were conducted by defendant Tomlin for the Woodruffs. One of his partners wrote the brief on appeal.

Thereafter, the instant action was filed by Patricia and Joan Woodruff (their father did not sue) against their lawyer, Tomlin, and his partners. This court dismissed the action as being barred by the statute of limitations, which dismissal was reversed on appeal (511 F.2d 1019 (6th Cir. 1975)) on the basis of a Tennessee decision that became available after the ruling here but before

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1. Except that, insofar as the jury verdicts assessed damages against Joan Woodruff, the judgments were reversed and the actions dismissed as to her.

the ruling in the Court of Appeals. This malpractice case was then set for trial in July, 1976.

Plaintiffs contended in their complaint and amended complaint that Tomlin and his partners were guilty of negligence in the investigation, trial and appeal of their cases and that such negligence proximately caused the loss of their claims. Pursuant to pre-trial order, plaintiffs specified that the defendants had been guilty of negligence in failing to personally interview a potential witness (who had been interviewed by the Tennessee Farmers investigator), in failing to present as a witness an accident reconstruction expert, in failing to prepare and introduce proper maps and plats, in failing to present adequate evidence that would support a reliance on last clear chance or discovered peril, in failing to object to examination of an expert offered by defendants or to properly cross-examine him, in failing to rely on certain statutes that were claimed to be applicable, in failing to object to a jury instruction, in failing to use available witnesses in rebuttal, and in failing, on appeal, to raise and argue all necessary assignments of error. Plaintiffs contended, as stated, that each and all of said acts or omissions proximately caused the loss of their claims.

In addition to the foregoing negligence alleged, plaintiffs contended that defendant Tomlin, since he represented Tennessee Farmers, had a conflict of interest in representing Joan Woodruff because she had a potential claim against her sister Patricia. In this connection, it has been the position of defendant Tomlin that there was never a conflict since Joan had stated from the first that Patricia was without fault and in detail supported the theory of the accident as related to him from the beginning by the father. Further, defendants contend that the coverage would have been only $10,000 and that in any event there would have been no coverage under the policy for Patricia with respect to a claim by her passenger-sister; there is

no proof tendered or in the record on these coverage questions one way or the other. In any case, it appeared to this court that this claim based on alleged conflict of interest on the part of defendant Tomlin should not be tried with the claims of negligence in losing the lawsuits and therefore it was, by pre-trial order, not dealt with at the trial.

The court had the impression that the only conflict of interest contention made by plaintiffs had to do, as above set out, with defendants' representation of the Woodruff's liability insurance company. However, just prior to the trial, plaintiffs sought to make the further contention that defendant Tomlin should not have represented both Joan and Patricia, since, if they had had separate counsel, there would have been advantages in offering witnesses and in the right to cross-examine them, and, further, Patricia's claimed negligence in operating the Woodruff car would not have rubbed off on Joan in the jury's mind.[2] The court concluded, at a pre-trial conference, that this contention, also, should not be tried with the contentions of negligence against defendants in their investigation, trial and appeal of these personal injury cases.

For completeness, it should be mentioned that defendants were charged with negligence in failing to remove this case to the federal district court at Jackson after the first trial. It appeared to the court that there would have been a serious question as to whether plaintiffs had at that time acquired an out-of-state domicile and therefore, in the malpractice trial, the jury would also be trying the domicile issue. In any event, we determined that it would be speculation to say that federal jury

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2. This contention was made even though the trial judge had instructed the jury as to the circumstances under which the negligence of the driver may be imputed to the passenger and also the duty of care of a passenger.

would have rendered a favorable verdict for the Woodruffs and therefore we dismissed this claim at a pre-trial conference.

The court determined that the malpractice liability of defendants would be tried first and, if liability were determined favorably to plaintiffs, the question of damages would then be tried. However, so that plaintiffs could show the malpractice jury the seriousness of their injuries (in support of their contention that defendants did not exercise proper care), by agreement plaintiffs were allowed to read to the jury a full summary of their injuries and damages. Moreover, the entire transcript (except that part dealing with injuries) of the second personal injury trial was read to the jury as well as the lengthy charge to the jury and the brief on appeal. This court had concluded that questions of law with respect to the personal injury trial became, with the aid of expert testimony, questions of fact for the malpractice jury and were so treated, leaving for the court questions of malpractice law. Plaintiffs presented, as part of their proof, an expert in accident reconstruction from Arizona and also an Arizona attorney who testified at length as to how these claims should have been investigated and tried by plaintiffs' lawyers. This court submitted to the jury practically all of plaintiffs' contentions as to negligence in the investigation and trial of the personal injury cases as well as their contentions that each and all of such negligent acts or omissions proximately caused the jury verdict against plaintiffs.[3] The court withdrew from the

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3. The court determined that the Tennessee doctrine of remote contributory negligence (which only reduces damages) would not come into play unless liability of defendants was found by the malpractice jury and then, in submitting the question to the malpractice jury as to what verdicts would have been found by the personal injury jury, the malpractice jury would have been instructed as to the doctrine of remote contributory negligence.

jury, at the conclusion of all the evidence, the question of negligence in handling the appeal, on the ground that there was no expert or other evidence to support plaintiffs' contention. The jury was unable to agree on a verdict as to any of the interrogatories.

On the motion for a judgment n.o.v. and for a dismissal, we therefore have to decide whether plaintiffs are entitled to have submitted to a jury the question whether defendant lawyers were guilty of negligence which proximately caused the loss of their claims and whether plaintiffs or either of them are entitled to have their conflict of interest claims submitted to a jury. We conclude that they are not and that therefore the motion for a judgment n.o.v. and for dismissal should be granted.

For some time prior to the trial, this court was particularly concerned because of our inability to find a reported decision dealing with this kind of case. Lead counsel for plaintiffs, who happens to be a member of the Arizona bar, reassured the court that he would supply such decisional law, but it never came.

Without any such decisions as guides, and analyzing the case as an original proposition, it seemed to this court that there are two main problems in maintaining such a case as this. The first is that the preparation for and trial of a lawsuit to a jury requires the exercise of a kind of judgment that is quite different from the kind of judgment exercised by other professionals. This is so because in dealing with human beings as the trial lawyer must, be the witnesses, judges, clients, adversary counsel and jurors, the factors that come into play are intangible and numerous, so that the trial lawyer has to rely on his education, practical experience, rational analysis and sheer instinct in making decisions. This being true, it was difficult for this court to believe that it would be

proper to submit to a jury, based upon the expert testimony of a second-guessing lawyer who has the benefit of hindsight, the question whether the trial lawyer was negligent.

The second reason why this court had serious doubt as to whether this action could be maintained has to do with causation; the malpractice jury is called upon to determine whether, if something that was done by the defendant trial lawyer had not been done or something that was not done had been done, the jury verdict in the personal injury case would have been different. This means that, in the malpractice trial, the personal injury trial becomes a play within a play; that is to say, the personal injury trial is replayed, by reading the record thereof, before the malpractice jury and witnesses then testify about the things that were done or not done by the malpractice defendant. It is interesting to note that, in principle at least, if an action such as this can be maintained, then an action could be maintained by the plaintiffs in this malpractice case against the attorneys representing them here, in which case there would be a play within a play within a play! In any event, it seemed to this court that it would be speculation for the malpractice jury to say what the personal injury jury would have done but for (we will assume) negligence on the part of the trial lawyer.

Just prior to the trial, counsel for defendants found an English case that supported their position, but this court determined to go ahead with the trial, which consumed slightly over eight trial days, and, as stated, resulted in a hung jury.

After the trial, the Tennessee Court of Appeals decided a case which deals squarely with the question presented here. It cites and discusses the above-mentioned English case. This decision is *Stricklan v. Koella,* (Tenn.App.,

decided September 20, 1976). In that case, plaintiff had employed the defendant lawyer to represent him in a civil case brought against him for assault and battery. Just prior to the trial, plaintiff discharged the defendant lawyer, settled the case himself by a cash payment, and then sued the lawyer for legal malpractice, alleging negligence in the preparation of the case and in failing to get a change of venue. The trial judge sustained the lawyer's motion for a summary judgment. The Court of Appeals affirmed, saying, in part:

> "Essentially and in simple terms, the cause of action stated is that retained counsel refused to use the trial tactics insisted upon by the client, for which refusal retained counsel's services were terminated; that the refusal of counsel to try or prepare the case in the manner insisted upon by the client (by filing of depositions) caused the client to be without representation on the day of trial and forced the client into an expensive settlement without a trial of his case; that the plaintiff was substantially damaged by the negligence of defendant because if the case had gone to trial and if counsel had taken depositions in the manner insisted upon and if the plaintiff and her witnesses in the suit against Stricklan had testified in such manner so that discrepancies would appear between that testimony, if given, and discovery testimony, if taken, the jury (if there had been one) would have found in favor of Stricklan or if they found against him, would have found in a lesser amount than settled for if the jury would have considered the testimony discrepancy if it had appeared. All if the case had been tried in another county.
>
> "We hold that there can be no such cause of action in this state.
>
> * * *

"In the English case of *Rondel v. Worsley,* reported as (1966) 1 All E.R. 467 (1966 C.A.), 3 All E.R. 657 and (1967 H.L.) 3 All E.R. 993, numerous reasons by judges were given for the holding that as matter of law no action would lie against a lawyer by his client for negligence in and about his conduct of the client's case in Court. Some judges were of the opinion that since in England no action could lie against the client by the barrister for failure to pay a fee, the client could not sue the barrister for his conduct of the trial, the distinction between a solicitor and barrister being duly noted and recognition made of the existence of a cause of action against a solicitor. Other judges tended to base their conclusions on the fact that lawyers in the trial of cases, do not owe allegiance to the client only, but owe dual allegiance; one to the client and the other to the Court; and if a client were permitted to sue a lawyer for what the client believes to be negligient trial tactics, in that they did not inure (in the client's opinion) to the benefit of the client, a trial lawyer would find himself sued for following his allegiance to the Court.

* * *

"Additionally, in all negligence cases, whether they be automobile related or medical or legal malpractice related, before a recovery can be had, the nexus between the negligence and the injury must be shown. In a suit complaining of the manner in which proof was presented and the manner of examination and cross-examination of witnesses, only by pure guesswork can the verdict of a jury be examined and a so-called cause for that verdict be determined. No man shall suffer a judgment against him based on guess."

As heretofore stated, this court, at the pre-trial stage, determined not to try the contentions of the plaintiffs with respect to alleged conflict of interest along with the contentions of alleged negligence in the preparation, trial and appeal of the personal injury cases. It will be remembered that one conflict of interest claim is that defendants, who generally represented Tennessee Farmers in the Jackson area and were in such capacity defending the Woodruffs in the personal injury litigation, should not have represented Joan Woodruff, the passenger, as a plaintiff since she had a potential claim against her sister, the driver. Although, as stated, there is no proof or tender of proof of coverage, we assume for present purposes that there would have been coverage. Obviously, Joan Woodruff is not suing here for damages for failure of defendants to sue her sister; rather, they are contending that this alleged conflict in some way inhibited defendant Tomlin's prosecution of the suit against the parties who were sued. This court cannot see how this could be so and, in any case, it would again be speculation to say that this affected the outcome of Joan Woodruff's personal injury trial.

The other conflict of interest claim is that defendant Tomlin should not have represented both Joan and Patricia Woodruff in their capacities as plaintiffs, because there would have been alleged tactical advantages at the trial, above described, if they had had separate counsel. Again, we are of the view that, even assuming there would would have been such advantages, it would be speculation for a jury to say that the absence of such advantage affected the outcome of the trial.

It is therefore ORDERED that the judgment n. o. v. be granted and the action dismissed.

The Clerk will enter a final judgment for the defendants.

APPENDIX B

No. 77-1216

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOAN WOODRUFF, PATRICIA WOODRUFF HAMILTON and LOUIS HAMILTON, her husband,
Plaintiffs-Appellants,

v.

HEWITT P. TOMLIN, JR., HOMER H. WALDROP, ROY HALL and DAVID R. FARMER, individually and as partners doing business under the name and style of Waldrop, Hall, Tomlin & Farmer, a professional business association,
Defendants-Appellees.

APPEAL from United States District Court for the Western District of Tennessee, Eastern Division.

Decided and Filed February 22, 1979.

Before: EDWARDS, Chief Judge, WEICK and CELEBREZZE, Circuit Judges.

WEICK, Circuit Judge. Plaintiffs-appellants' suit in the District Court was against an attorney at law and his law firm, to recover damages, alleging legal malpractice consisting of conflicts of interest and negligence in their representation of plaintiffs in personal injury actions arising out of a truck-auto collision, which actions the attorneys filed in plaintiffs' behalf in the state court, and which resulted in judgments against the plaintiffs. Jurisdiction in the malpractice action was based on diversity of citizenship.

The District Court granted defendants' motion to dismiss the complaint on the ground that plaintiffs' action was barred by Tennessee's one-year statute of limitations. T.C.A. 28-304. On appeal, we reversed and remanded for trial. *Woodruff v. Tomlin,* 511 F.2d 1019 (6th Cir. 1975).

On remand the case was tried before a jury on the issue of liability. The jury was unable to agree on a verdict and the court declared a mistrial. The defendants then filed a motion for judgment n.o.v. and for dismissal of the complaint, which motion was granted by the court in a Memorandum Decision reported in *Woodruff v. Tomlin,* 423 F. Supp. 1284 (W.D. Tenn. 1976).

Plaintiffs have appealed therefrom to this Court. We are of the opinion that there were factual issues which should be determined by a jury, and not by the court, and that the court erred in summarily dismissing the conflicts of interest claim, in the exclusion of evidence, and in the granting of the motion n.o.v. We reverse.

The plaintiffs, Joan Woodruff and her sister, Patricia, then 15 and 16 years of age respectively, were severely injured on May 22, 1968, when an automobile driven by Patricia and owned by her father, in which automobile Joan was riding as a passenger, was struck by a large truck loaded with gravel weighing about 73,000 pounds, on Highway 100 in Chester County, Tennessee. Joan was thrown out of the car and the truck ran over her legs, crushing the bones and tearing the skin off her legs, crippling her for life. Patricia sustained a skull and brain injury resulting in traumatic amnesia, so that she had no memory of the accident.

The girls' hospital bills alone exceeded $20,000.

The girls' father, Charles Woodruff, carried liability insurance on his car with Tennessee Farmers Mutual In-

surance Company. with limits of $10,000 for one person, and $20,000 for more than one person. While the girls were in the hospital Theo. Leathers, the Claims Adjuster for the insurer, contacted Mr. Woodruff and gave him a check for medical reimbursement. Leathers advised Mr. Woodruff that he should retain a lawyer. Leathers told Mr. Woodruff that the statements of witnesses to the collision were inconsistent and were changing.

Leathers recommended to Woodruff that he retain Hewitt P. Tomlin, stating that Tomlin was a good lawyer. Tomlin was also the attorney for Tennessee Farmers Mutual Insurance Company. Woodruff then engaged Tomlin to represent his two daughters, and also to represent himself in his claim for damages to his car.

Tomlin filed two suits for personal injuries sustained by the girls and one for damages to the car, against Pomeroy, the driver of the large truck, Teague, the owner of the truck, and Nobles, the owner of the second truck. The suits were filed in the Circuit Court of Chester County, Tennessee.

Pomeroy, the truck driver, and Teague, the owner of the truck, filed suits in said Circuit Court against Patricia Woodruff and her sister Joan, to recover damages for personal injury sustained by Pomeroy, and for damages to the truck. They alleged negligence on the part of Patricia, and that Joan, the passenger, aided and abetted. Tomlin, as attorney for Tennessee Farmers Mutual Insurance Company, defended the suits against the two girls. The suits were all consolidated for trial.

The cases in the state court were tried before a jury, which disagreed 9-3, and a mistrial was declared. At the second trial in the state court the jury returned a verdict in favor of the defendants in the personal injury actions of Patricia and Joan against Pomeroy, Teague and Nobles.

In the suit of Pomeroy and Teague against Patricia and Joan the jury returned verdicts in favor of Pomeroy for $600, and Teague in the amount of $3,000.

Upon appeal to the state court of appeals the judgments for the defendants in the personal injury cases of Patricia and Joan against Pomeroy, Teague and Nobles, were affirmed. The judgments in favor of Pomeroy and Teague against Patricia, totaling $3,600, were affirmed, but were reversed as to Joan, the Court holding that there was no evidence to prove that Joan, the passenger, aided and abetted in the negligence of Patricia. Therefore Joan was not contributorily negligent, and Patricia's negligence could not be imputed to her.

The appeals court then referred to damaging concessions made by Tomlin's law firm in their appellate brief, as follows:

> In short, the fact is that there is material evidence in this record from which the jury could have concluded that Patricia Woodruff was guilty of negligence. This fact is conceded in appellants' brief and it is therein admitted that neither of the plaintiffs in the original cases of Patricia Woodruff vs. Nobles, Pomeroy and Teague, and in Charles Woodruff vs. the same defendants can now prevail. [App. 162-63]

As we will point out later, this damaging admission wrecked Joan's case for personal injuries against Pomeroy, Teague and Nobles. There was plenty of evidence of negligence on the part of the two truck drivers for submission of the issue to the jury. The issue of contributory negligence of Joan was eliminated from the case by the court of appeals. By reason of this wrongful admission, there was no issue for Joan to take her case to the Supreme Court of Tennessee. In effect what was done was to impute the negligence of Patricia to Joan, and the doctrine

of imputed negligence does not prevail in Tennessee, as the state court of appeals held. *See also Gulf, M. & O. R. Co. v. Underwood,* 182 Tenn. 467, 187 S.W.2d 777 (1945).

The wrongful admission also ruined Patricia's case for negligence against Pomeroy, Teague and Nobles. As we will later point out, the state trial judge gave an erroneous instruction to the jury on last clear chance. Tomlin did not point out this error to the trial judge, and did not claim it as error in his motion for a new trial, and his law firm did not assign it as error in the state court of appeals. If they had done so, instead of making admissions against the interest of their clients, the appellate court, in all probability, would have reversed and remanded for a new trial. Their clients were deprived of their right to a new trial and their right to proceed against Pomeroy, Teague, or Nobles, or their insurers.

The malpractice complaint charges Tomlin with representing conflicting interests and with negligence in the investigation, preparation and trial in the circuit court and in the appeal in the state appellate court.

The most grievous of the allegations of negligence against Tomlin was his failure to object to an erroneous instruction on last clear chance, in the second trial, and to raise that issue on motion for a new trial, and on appeal. Also, complaint was made concerning his failure to call witnesses who had stepped off various skid marks; his failure to engage an accident reconstruction expert to testify as to critical issues at the trial; and his failure to support the charge of negligence against defendant Nobles in violating T.C.A. § 59-854(a) by driving slowly downhill, and in violating T.C.A. § 59-859 by stopping.

It is also contended that the District Judge erred in applying a standard governing liability of attorneys which

would virtually exempt attorneys from any liability to their clients for malpractice.

At the time of the accident Patricia and her sister Joan were returning home from a trip to Chicasaw State Park. Patricia was driving her father's Chrysler automobile, with his permission. She had a driver's license. Patricia was driving in broad daylight, in a westerly direction on Highway 100, which is a two-lane, paved highway in Chester County. She was followed closely by another automobile occupied by a friend, Gail Sterling. Patricia, Joan and Gail Sterling all testified that Patricia was driving at about 55 miles per hour. The speed limit on the highway was 65 miles per hour.

When Patricia passed over the crest of a steep hill, to proceed downhill, a short distance from Chicasaw State Park, she was suddenly confronted with a serious traffic problem. A small truck owned and operated by defendant Nobles, was moving down the steep hill, in the same direction as Patricia was traveling; he came to a complete stop about 300 feet ahead of Patricia and at a point opposite a dirt side road to the south. Approaching her from the opposite direction and at some distance was the large truck loaded with gravel, which truck was about 35 feet long, weiging 73,000 pounds. That truck was owned by G. L. Teague, and was being operated by his servant, James Pomeroy. Thus the two trucks impeded travel in both lanes of the two-lane highway.

Patricia applied the brakes of her car, which commenced to skid forward in her lane, and then sidewise over on the left side of the road until it came to a complete stop with the front of the car off the road, heading into a ditch, and the rear of her car protruding out into her left or south lane. After her car had stopped Patricia flicked the starter several times in order to start the

motor of the car, but the starter did not work. The large truck then crashed into the right rear fender of her car.

There was evidence that the car was stopped in a position of peril about 5.9 seconds before the crash when the large truck was 168 feet away and then traveling at the rate of 30 miles per hour. The driver could have applied his brakes and stopped within 95 feet, or 73 feet before the collision. Actually the truck driver saw the auto skidding on his side of the road when he was 347 feet away from the point of impact. After the collision, and going uphill, the truck still continued to travel a distance of 112 feet, skidding 24 feet before the point of impact.

I

CONFLICT OF INTEREST

Tomlin and his law firm were the attorneys for Tennessee Farmers Insurance Company, and had represented that company for a number of years. As before stated, it was the insurer's adjuster, Theo. Leathers, who recommended to the insured, Mr. Woodruff, that he engage Tomlin to represent the two girls in their personal injury cases, as well as to handle Mr. Woodruff's action for damages to his car, against Pomeroy, the truck driver, and Teague, the owner of the truck. The adjuster reported to Mr. Woodruff that the statements of witnesses were inconsistent, and were changing.

No doubt Tomlin became fully aware of the inconsistent statements of witnesses when he received the claim file from his client, the Insurance Company. He also learned of this fact when Pomeroy and Teague filed suit for damages against Patricia and Joan, alleging that Patricia negligently caused the injury to Pomeroy and the damage to the truck, and alleging that Joan, the passenger, aided and abetted Patricia.

Tomlin, in defending the suits of Pomeroy and Teague against Patricia and Joan, necessarily was contending until the case reached the appellate court, that Patricia was not negligent. He could not, therefore, very well have represented Joan in a suit against Patricia, which would have required himt to allege that Patricia was negligent. Tomlin should have advised Joan to obtain other counsel.

In his deposition taken in the malpractice suit, Tomlin testified:

> Q Of course, you, as a lawyer, knew that Patsy [Patricia], as the driver of the vehicle, could be responsible to Joan for her injuries; legally, that is?
>
> A It is theoretically possible, yes.
>
> Q And that a lawsuit could have been filed
>
> A A lawsuit could have been filed in theory, yes, sir.
>
> Q Or a claim presented to Tennessee Farmers demanding payment?
>
> A It could have been.
>
> Q All right, and I take it from your answer to the previous question that you never did discuss this with the parents, and you have told me the reason, but you never did discuss it with them, is that correct?
>
> A I never said to them or advised them that "You should present a claim to Tennessee Farmers," because they believed and I believed that Patricia was free of any negligence and they wanted her claim pressed, as well as Joan's.
>
> Q Mr. Tomlin, the question was not whether you told them that they should. The question was, did you ever tell them that it could be done?
>
> A To sit here and tell you specifically I told them it could be done, I can't dogmatically say that I did, but I can't dogmatically say that I didn't.

At this late date it was much more than mere "theory" that Joan had a right of action against her sister Patricia

to recover damages if Patricia was negligent, since the jury had found that Patricia was negligent. Tomlin had an obligation to, and did, defend Patricia and Joan as insureds under the policy of liability insurance, as he was attorney for the insurer. Also the state appellate court found that Joan was not an aider and abetter; she was a passenger. Patricia's negligence could not be imputed to Joan.

If Joan had only been represented by other counsel, and had sued her sister Patricia for damages for personal injuries, the jury, having found that Patricia was negligent in the suits by Pomeroy and Teague, would necessarily have returned a verdict in favor of Joan against Patricia in Joan's case. Any other verdict could not be supported since the state court of appeals held that Joan was not an aider and abetter, and therefore was not negligent.

The District Judge in his opinion stated that the defendants claim that Joan was not covered under the liability policy of Woodruff. Defendants offered no such proof, and the undisputed fact is that Tomlin was defending both Joan and Patricia in the suit filed by Pomeroy and Teague.

The District Court further stated:

> In any case, it appeared to this court that this claim based on alleged conflict of interest on the part of defendant Tomlin should not be tried with the claims of negligence in losing the lawsuits and therefore it was, by pre-trial order, not dealt with at the trial. [App. 107]

The District Court cites no authority for such a proposition. This was a legal malpractice case. If conflict of interest should not be dealt with in a malpractice case, where should it be dealt with?

Malpractice is defined in Webster's New World Dictionary of the American Language, College Edition, with respect to persons other than physicians, as:

2. Misconduct or improper practice in any professional or official position.

Negligence of an attorney in the investigation, trial, and appeal of his client's case is certainly improper practice in his professional capacity; it is malpractice. It is also malpractice for an attorney to represent parties with conflicting interests, without his disclosing all facts to his clients and obtaining their consent.

Canon 6 of the Canons of Professional Ethics of the American Bar Association provide in part as follows:

> It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.
>
> It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose. [Opinions on Professional Ethics, p. 22.]

The Supreme Court of Tennessee, effective August 31, 1948, in its Canon of Ethics 38 adopted the Canons of Professional and Judicial Ethics of the American Bar Association "now in force and as hereafter modified or supplemented." 185 Tenn. 889.

The American Bar Association has supplemented its Canons of Professional Ethics and the Supplements were adopted by the Supreme Court of Tennessee as shown in Volume 5A of Tennessee Code Annotated, on pages 119 and 115, respectively, as follows:

DR 5-105. Refusing to Accept or Continue Employment If the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer. — (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situtions covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each. [p. 119]

Interests of Multiple Clients

EC 514. Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two (2) or more clients who may have differing interests, whether such interests be conflicting inconsistent, diverse, or otherwise discordant.

> **EC 5-15.** If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients. [p. 115]

It is clear from the testimony of Tomlin that he made no disclosure to his clients of all the circumstances of his relations to the parties and of their connection or interest in the controversy, and that his clients never consented. Furthermore, in representing Patricia it was Tomlin's duty to contend that Patricia was not negligent, although he knew that this was a disputed issue of fact. In representing Joan it was his duty to contend that Patricia was negligent in order to maintain a claim against her and Woodruff's insurer. In fact, in the state court of appeals Tomlin's law

firm made a damaging admission against the interests of their clients, as heretofore set forth.

As a matter of fact it appears that the state appellate court actually imputed Patricia's negligence to Joan, as there was ample evidence of negligence against Pomeroy and Nobles. The state appellate court should have remanded this issue for trial. It was for the jury to decide whether the two truck drivers were negligent. To correct this error Tomlin's law firm should not, in their appellate brief, have made admissions against the interest of their clients, and should have petitioned the Supreme Court of Tennessee for certiorari.

When the District Judge, in a pretrial conference, ruled that conflict of interest could not be considered in a legal malpractice case where negligence was also alleged, the plaintiffs petitioned our Court for a writ of mandamus and prohibition to obtain relief from this error.

In an order entered July 8, 1976, we held that no appeal lies from an interlocutory order except by leave of court, and that mandamus is an extraordinary remedy and can not be used as a substitute for an interlocutory appeal. *Woodruff v. Honorable Bailey Brown*, No. 76-1892, Court of Appeals, 6th Cir.

During the trial in the District Court plaintiffs again raised the conflict of interest issue and proffered proof which the District Court rejected, and declined to submit the issue to the jury, and finally dismissed the complaint when it granted judgment n.o.v

In this direct appeal we now have jurisdiction to hear and to determine the issue of conflict of interest.

In our opinion it was prejudicial error for the District Court at its pretrial conference to separate and remove the issue of conflict of interest from other issues of mal-

practice, and to deny the admission of relevant evidence with respect thereto at the trial, and to decline to submit the issue to the jury for determination. If the issue of conflict of interest had been submitted to the jury it could have produced a different result.

II

OTHER GROUNDS OF MALPRACTICE

A. The Erroneous Instruction On Last Clear Chance

At the second trial in the state court the trial judge submitted to the jury the issue of last clear chance. Although conflicting, there was substantial evidence requiring such submission, that Pomeroy, the truck driver, saw the Woodruff car in a position of peril when Pomeroy was a sufficient distance away that he could have stopped his truck and averted the collision, had he exercised ordinary care. Instead, he not only did not bring his truck to a stop, but after the collision he continued uphill about 112 feet from the point of impact.

The instruction given by the state trial judge to the jury on the issue of last clear chance was as follows:

> I charge you that if you believe from the evidence that Mr. Pomeroy saw, or by the exercise of reasonable care, should have seen the plaintiff's vehicle in a position of imminent peril and in danger of being struck by the truck which he was driving, and you find that the defendant, Pomeroy, in time thereafter by the exercise of reasonable care with the means and appliances at hand on his truck, and with safety to himself and to his truck, could have stopped the same or could have decreased the speed of same, or could

> have diverted the course of same, and thereby avoided the collision, the plaintiffs would be entitled to recover, *provided they are not guilty of contributory negligence that proximately caused the accident.* [Emphasis added]

This instruction was clearly erroneous. Under the doctrine of last clear chance plaintiff's contributory negligence had ceased. It was no longer a proximate cause. The defendant saw the plaintiff in a position of peril in sufficient time that he could have averted the collision had he exercised ordinary care.

The instruction of the trial court defeated the entire purpose of the doctrine. It conflicted with a decision of the Supreme Court of Tennessee in *Vaughn v. City of Alcoa,* 194 Tenn. 449, 251 S.W.2d 304 (1952). It also conflicted with our decision applying Tennessee law in *Smith v. Beattie,* 346 F.2d 139 (6th Cir. 1965).

It is argued that the erroneous instruction is supported by an appellate decision in *Smith v. Craig,* 484 S.W.2d 549 (Ct. App. Tenn., *cert. denied* Aug. 7, 1972). The Supreme Court of Tennessee repudiated *Smith v. Craig, supra,* in *Street v. Calvert,* 541 S.W.2d 576 (1976).

The trial judge, in giving the erroneous instruction, was bound by the decision of the Supreme Court of Tennessee in *Vaughn v. City of Alcoa, supra,* rather than by an erroneous decision of an inferior appellate court.

Tomlin did not even object to the erroneous instruction in the state court trial, nor request the court to change it. He did not assert it as error in a motion for a new trial filed in the state court, nor did he assign it as error in the state court of appeals.

It was error for the District Court to grant judgment n.o.v. as this vital issue of malpractice should have been

submitted to the jury for determination, and could have produced a different verdict. Expert testimony on this issue and on proximate cause was offered by plaintiffs in the malpractice trial.

B. Failure To Call Witnesses

It is not understandable why Tomlin did not offer expert testimony at the second trial in the state court, namely, an accident reconstruction expert, to refute the testimony of Col. Dawson, the expert offered by the defendants. Dawson was a state police officer.

In the malpractice case, to defend himself and his law firm, they called as expert witnesses three attorneys and the state court trial judge. They also took the deposition of the state appellate court judge who wrote the opinion affirming the judgment of the trial court, which was offered in evidence. It was certainly unprecedented to call as witnesses the judges who decided in their favor, and to support their decisions.

Canon 2B of the Code of Judicial Conduct provides that the Judge "should not testify voluntarily as a character witness" because it would inject the prestige of his office into the proceeding to which he testifies.

In the present case no criticism can be levelled at the state court judges for testifying in favor of the attorneys for a party to a case, in whose favor they decided, because the two judges in testifying responded to subpoenas issued by the defendants.

It should be observed, however, that if the attorneys had exercised the same degree of diligence, by calling at least one expert witness, in handling the case for their clients as they did in defending themselves in the malpractice case, the result in the state court personal injury cases might well have been different.

Mr. Woodruff also testified that he requested Tomlin to call as a witness, Gene Burkhead, who could testify as to the negligence of defendant Nobles, and also could support the testimony of Joan, but he was never called as a witness.

Mr. Woodruff further testified that he advised Tomlin that his adult son Eddy and a neighbor, James McClendon, went to the scene of the accident and stepped out the skid marks on the pavement, laid down by the Woodruff car, as sixty paces, or 180 feet, which conflicted with the testimony of Col. Dawson, a police officer, who testified at the first trial to skid marks of 252 feet, but Tomlin never called them as witnesses. Tomlin did not even interview Col. Dawson, claiming it would be unethical for him to interview defendant's expert witness. We see nothing unethical for a lawyer to interview a state police officer.

After the first state court trial Mr. Woodruff was advised by one of the jurors and by friends that the plaintiffs could not obtain a fair trial in Chester County, and he requested that the cases be removed from that county. Tomlin advised Woodruff that this could not be done. Tomlin admitted in his deposition, however, that the plaintiffs could have dismissed their complaints without prejudice and refiled in the federal court. It was at the second trial in the state court that Nobles had contact with one of the jurors relating to coon hunting on his farm. This at least was admittedly erroneous advice given by Tomlin to his client.

C. Tennessee Law Applicable To Legal Malpractice

In granting defendants-appellees' motion for judgment n.o.v. after the jury could not agree on a verdict, and the court had granted a mistrial, the court relied on two grounds. First, the District Court accepted a Tennessee Court of Appeals decision in *Stricklan v. Koella*, 546 S.W.2d

810 (1976), *cert. denied* by the Tennessee Supreme Court (1977), as the law of legal malpractice liability in Tennessee for negligence in the investigation, trial and appeal of a personal injury and property damage suit. The second ground for the District Court's dismissal was that the harm done to appellants, if any, was speculative and therefore was not within the province of the jury.

The District Court rested its decision on a statement in *Stricklan, supra,* that in Tennessee no cause of action exists based on a lawyer's refusal to prepare a case in the manner insisted upon by the client. In *Stricklan* attorney Koella was retained by the plaintiff to defend him against charges of assault and battery. The client discharged Koella shortly before the trial date because Koella refused to introduce certain depositions, refused to call certain witnesses, or to conduct certain cross examination at the upcoming trial. After paying an expensive settlement without the benefit of counsel, the client sued Koella for the amount of the settlement and costs, and for $250,000 for damage to his reputation.

In addition to suing Koella for his refusal to conduct the upcoming trial as directed, the client also sued Koella for declining to move for a change of venue. Koella answered that a motion for change of venue would have been unfounded and improper and would not have been granted. In the present case the attorney gave admittedly incorrect legal advice to his client concerning the client's right to voluntarily dismiss his action without prejudice and to sue in the federal court.

Koella further answered that the pretrial discovery depositions in issue in his judgment developed no discrepancies in testimony and would have been of no use in the upcoming trial. The defendant's motion for summary judgment was granted.

In the present case the District Court was of the opinion that the holding in *Stricklan* prevented the Woodruffs from suing for negligence in the investigation, trial, and appeal of their personal injury suit.

We believe that the District Court misapplied *Stricklan*. There was no actual trial in *Stricklan*, and there was no evidence of any negligence on the part of Koella, either by expert witnesses or otherwise. An attorney, like any other professional, is liable for acts of negligence in the conduct of his professional work. He has a duty to possess and to use that degree of skill, competence, and learning ordinarily possessed and used by others in the same profession, under like and similar circumstances. An attorney who fails to perform his duties for his client in accordance with accepted standards of legal practice is negligent. He is liable for damages proximately caused to the client thereby. RESTATEMENT (SECOND) OF TORTS § 299A (1965); PROSSER, LAW OF TORTS § 32 (4th ed. 1971). A lawyer is not exempt from malpractice liability for trial related work.

Although there is no Supreme Court of Tennessee decision directly on the precise points involved in the present appeal, we believe from a survey of Tennessee law that the Tennessee Supreme Court would hold lawyers liable for negligence in the investigation, trial, and appeal of actions when that negligence proximately injured a client.

An attorney is not liable for mistakes in judgment or for tactical decisions, but he is liable for negligence that proximately causes injury to his client. Canon 6 of the Tennessee Code of Professional Responsibility requires a Tennessee attorney to represent a client competently, to prepare adequately, and to give appropriate attention to his work. The Tennessee standard for malpractice liability was set forth by the Tennessee Supreme Court in *In re Woods*, 158 Tenn. 383, 389, 13 S.W.2d 800 (1929), as follows:

> [W]hile an attorney does not guarantee the accuracy of all he does, he is bound to exercise reasonable skill and diligence in attending to business entrusted to his care and he is bound to possess such reasonable knowledge of well-settled rules of law as will enable him to perform the duties he undertakes.

See also Hillhouse v. McDowell, 219 Tenn. 362, 410 S.W.2d 162 (1966).[1] The *Stricklan* decision itself recognizes that a Tennessee attorney may be held for legal malpractice.[2] The same standard is applied to all attorneys in the state.

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1. For lower court cases see *Holcomb v. Steele*, 47 Tenn. App. 704, 342 S.W.2d 236 (1958), *Hill v. Mynatt*, 59 S.W. 163 (Tenn. Ct.App. 1900).

Other jurisdictions recently have required ordinary care, skill, and diligence from attorneys or, as it is alternatively phrased, that degree of care, skill and diligence which is commonly possessed and exercised by attorneys in practice in the jurisdiction. *Smith v. Lewis*, 13 Cal.3d 349, 118 Cal. Rptr. 621, 530 P.2d 589 (1975), *Cook v. Flanagan & Berst v. Clausing*, 73 Wash. 2d 393, 438 P.2d 865 (1968). This standard is well supported historically. *See, e.g., Goodman & Mitchell v. Walker*, 30 Ala. 482 (1857), *Gambert v. Hart*, 44 Cal. 542 (1872), *Cox v. Sullivan*, 7 Ga. 144 (1849), *Stevens v. Walker & Dexter*, 55 Ill. 151 (1870), *Babbitt v. Bumpus*, 73 Mich. 331, 41 N.W. 417 (1889). *See also Skillen v. Wallace*, 36 Ind. 319 (1871), *Gilbert v. Williams*, 8 Mass. 51 (1811).

For further discussion and authority see Annot., 45 A.L.R.2d 5-58 (1956).

2. In *Stricklan, supra*, 546 S.W.2d at 812-13, the Court said:

> Of course, there are cases which recognize a cause of action for legal malpractice. See *Hillhouse v. McDowell*, (1966) 219 Tenn. 362, 410 S.W.2d 162; *Gay & Taylor, Inc. v. American Cas. Co. of Reading, Pa.*, (1963 E.S.) 53 Tenn.App. 120, 381 S.W.2d 304; *Hill v. Mynatt*, (1900 Tenn.Ch.App.) 59 S.W. 163. Ordinarily a lawyer, like a physician, is liable for professional negligence. 87 A.L.R.2d 986; *Hill v. Mynatt, supra.*

The Court further said (546 S.W.2d at 814):

> We do not hold that there generally is no cause of action against an attorney for his negligence or malpractice; we only hold that for the reasons given, there can be no cause of action against an attorney arising out of the manner in which he honestly chooses to present his client's case to the trier of the facts.

Older Tennessee decisions reflect a tradition in Tennessee jurisprudence of holding an attorney responsible for damages flowing from negligence in the conduct of his professional duties. *Collier v. Pulliam,* 81 Tenn. 114 (1884), *Read v. Patterson,* 79 Tenn. 430 (1883); *A.T. Bruce & Co. v. Baxter,* 75 Tenn. 477 (1881); *Bills v. Polk,* 72 Tenn. 494 (1880).

We do not agree with the District Court that the harm, if any, done to appellants in the present case was speculative and therefore beyond the province of the jury. Causation, historically, has been determined by the jury in all cases involving breach of a standard of reasonable care. In the present case negligence and causation were testified to by plaintiffs' expert.

To recover, plaintiffs must show and convince the jury that, but for the negligence of defendants, the action would have been successful. *Collier v. Pulliam, supra. See also Maryland Cas. Co. v. Price,* 231 F. 397 (4th Cir. 1916), *Spangler v. Sellers,* 5 F. 882 (C.C. Oh. 1881), *Sitton v. Clements,* 257 F.Supp. 63 (E.D. Tenn. 1966), *aff'd* 385 F.2d 869 (6th Cir. 1967), *McLellan v. Fuller,* 226 Mass. 374, 115 N.E. 481 (1917), *Vooth v. McEachen,* 181 N.Y. 28, 73 N.E. 488 (1905).

The damages recoverable would be the full value of the claim lost. *See A.T. Bruce & Co., supra,* at 481; Annot. 45 A.L.R.2d 62-71 (1956).

III

We find no error in the District Judge's denial of a motion filed by the plaintiffs to require his recusal under 28 U.S.C. § 455(a). Such recusal cannot be based on decisions or rulings of a Judge. *Oliver v. Michigan State Bd. of Educ.,* 508 F.2d 178 (6th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975).

CONCLUSION

We are of the opinion that, as pointed out hereinbefore, just too many things went wrong prejudicially affecting the substantial rights of their clients, to absolve the defendants from liability for malpractice. The most grievous errors are the conflicts of interest, the prejudicial and improper admissions against the interests of their clients in the state court of appeals, and the mishandling of the issue of last clear chance.

The judgment of the District Court is reversed and the case is remanded for a new trial.

APPENDIX C

No. 77-1216

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOAN WOODRUFF; PATRICIA WOODRUFF HAMILTON and LOUIS HAMILTON, Her Husband,
Plaintiffs-Appellants,

v.

HEWITT P. TOMLIN, JR.; HOMER H. WALDROP; ROY HALL; and DAVID R. FARMER, Individually and as Partners Doing Business Under the Name and Style of WALDROP, HALL, TOMLIN & FARMER, a Professional Business Association,
Defendants-Appellees.

APPEAL from the United States District Court for the Western District of Tennessee, Eastern Division.

Decided and Filed February 21, 1980.

Before: EDWARDS, Chief Judge; WEICK, CELEBREZZE, LIVELY, ENGEL, KEITH and MERRITT, Circuit Judges.

LIVELY, Circuit Judge, delivered the opinion of the Court, in which EDWARDS, Chief Judge, and CLELBREZZE and KEITH, Circuit Judges, joined. WELICK, Circuit Judge (pp. 26-38) filed a separate opinion dissenting in part and concurring in part. ENGEL, Circuit Judge (pp. 38-40) filed a separate dissenting opinion. MERRITT, Circuit Judge (pp. 41-50) filed a separate dissenting opinion.

LIVELY, Circuit Judge. This case involves a claim of legal malpractice arising from the manner in which the defendants handled litigation on behalf of the plaintiffs in

the Tennessee state courts. Jurisdiction of the district court was based on diversity of citizenship. The district court severed the plaintiffs' claims based on alleged conflict of interests in the defendants' representation of multiple parties. The district court also ordered a bifurcated jury trial, reserving questions of damages until after the jury had determined issues of liability. The case was tried to a jury on the plaintiffs' claims that the defendants negligently conducted "the investigation, preparation for trial and presentation at trial" of the plaintiffs' claims for personal injuries arising from an auto-truck collision. The jury in the district court was unable to agree on a verdict and the court declared a mistrial. The defendants then filed a motion for judgment n.o.v. and for dismissal of the complaint. This motion was granted. *Woodruff v. Tomlin,* 423 F.Supp. 1284 (W.D. Tenn. 1976).

An appeal was taken to this court from the final judgment dismissing the malpractice action. After oral argument a panel of the court reversed the judgment of the district court. *Woodruff v. Tomlin,* 593 F.2d 33 (6th Cir. 1979). Thereafter this court granted rehearing *en banc* by an unpublished order entered May 24, 1979. Following additional briefing and oral argument the case is before the court for decision. Though the effect of the granting of a rehearing *en banc* is to vacate the previous opinion and judgment of this court (Rule 14, Rules of the Sixth Circuit), we adopt the following statement from the panel opinion:

> The plaintiffs, Joan Woodruff and her sister Patricia, then 15 and 16 years of age respectively, were severely injured on May 22, 1968, when an automobile driven by Patricia and owned by her father, in which automobile Joan was riding as a passenger, was struck by a large truck loaded with gravel weighing about 73,000 pounds, on Highway 100 in Chester County, Tennessee. Joan was thrown out of the car and the

truck ran over her legs, crushing the bones and tearing the skin off her legs, cripping her for life. Patricia sustained a skull and brain injury resulting in traumatic amnesia, so that she had no memory of the accident.

The girls' hospital bills alone exceeded $20,000.

The girls' father, Charles Woodruff, carried liability insurance on his car with Tennessee Farmers Mutual Insurance Company, with limits of $10,000 for one person, and $20,000 for more than one person. While the girls were in the hospital Theo. Leathers, the Claims Adjuster for the insurer, contacted Mr. Woodruff and gave him a check for medical reimbursement. Leathers advised Mr. Woodruff that he should retain a lawyer. Leathers told Mr. Woodruff that the statements of witnesses to the collision were inconsistent and were changing.

Leathers recommended to Woodruff that he retain Hewitt P. Tomlin, stating that Tomlin was a good lawyer. Tomlin was also the attorney for Tennessee Farmers Mutual Insurance Company. Woodruff then engaged Tomlin to represent his two daughters, and also to represent himself in his claim for damages to his car.

Tomlin filed two suits for personal injuries sustained by the girls and one for damages to the car, against Pomeroy, the driver of the large truck, Teague, the owner of the truck, and Nobles, the owner of the second truck. The suits were filed in the Circuit Court of Chester County, Tennessee.

Pomeroy, the truck driver, and Teague, the owner of the truck, filed suits in said Circuit Court against Patricia Woodruff and her sister Joan, to recover damages for personal injury sustained by Pomeroy, and for damages to the truck. They alleged negligence on the

part of Patricia, and that Joan, the passenger, aided and abetted. Tomlin, as attorney for Tennessee Farmers Mutual Insurance Company, defended the suits against the two girls. The suits were all consolidated for trial.

The cases in the state court were tried before a jury, which disagreed 9-3, and a mistrial was declared. At the second trial in the state court the jury returned a verdict in favor of the defendants in the personal injury actions of Patricia and Joan against Pomeroy, Teague and Nobles. In the suit of Pomeroy and Teague against Patricia and Joan the jury returned verdicts in favor of Pomeroy for $600, and Teague in the amount of $3,000.

Upon appeal to the state court of appeals the judgments for the defendants in the personal injury cases of Patricia and Joan against Pomeroy, Teague and Nobles, were affirmed. The judgments in favor of Pomeroy and Teague against Patricia, totaling $3,600, were affirmed, but were reversed as to Joan, the Court holding that there was no evidence to prove that Joan, the passenger, aided and abetted in the negligence of Patricia. Therefore Joan was not contributorily negligent, and Patricia's negligence could not be imputed to her.

593 F.2d at 35-36.

In the district court the plaintiffs contended that the loss of their personal injury actions in the state trial and appellate courts was proximately caused by negligence of the defendants and by their breach of fiduciary duties arising from the attorney-client relationship. The claim of negligence was predicated upon the following acts and omissions of the defendant Tomlin or other members of his law firm:

(1) Failure to attempt to obtain a change of venue or take a nonsuit and refile in a federal court after the first personal injury trial resulted in a hung jury.

(2) Failure to object to a "clearly erroneous" jury instruction at the second personal injury trial and failure to include the giving of this instruction in the motion and grounds for a new trial.

(3) Failure to consult a traffic reconstruction expert to develop time/distance factors and establish stopping distances.

(4) Failure to interview and present available witnesses who could testify to important facts.

(5) Failure to bring to attention of the trial court certain Tennessee statutes bearing on issues in the case.

(6) Negligence in the conduct of the appeal. This claim was based primarily on the fact that the defendants conceded in their brief in the Tennessee Court of Appeals that there was substantial evidence to support the jury's finding that Patricia was negligent in the operation of her father's automobile. It was also contended that the defendants failed to argue applicable statutes in their appellate brief and failed to argue the "clearly erroneous" instruction.

All of these contentions have been renewed in this court. Since this is a diversity case the court is required to apply the substantive law of Tennessee. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Our problem in this respect arises from the fact that the Supreme Court of Tennessee has never decided a legal malpractice case on facts even remotely resembling those of the present case. In fact, there is a dearth of reported decisions from any jurisdiction dealing with charges of negligence and malpractice in the conduct of litigation. However, the Ten-

nessee Court of Appeals rendered a decision while the present case was pending in the district court in which it held "there can be no cause of action against an attorney arising out of the manner in which he honestly chooses to present his client's case to the trier of facts." *Stricklan v. Koella,* 546 S.W.2d 810, 814 (Tenn. App. 1976), *cert. denied* by Supreme Court of Tennessee, February 7, 1977. The district court found that the *Stricklan* case "deals squarely with the question presented here." 423 F.Supp. at 1288. On appeal it is argued by the defendants that *Stricklan* states the common law of Tennessee, and since there was no charge of dishonesty or bad faith on their part, there can be no cause of action against them for the manner in which they chose to conduct the litigation on behalf of the plaintiffs.

In an early decision applying the *Erie* doctrine, the Supreme Court held that "in the absence of more convincing evidence of what the state law is," a federal court should apply the law as declared by an intermediate state court. *Fidelity Trust Co. v. Field,* 311 U.S. 169, 177-78 (1940). Chief Justice Hughes, writing for the Court, noted, "We have no other evidence of the state law in this relation." *Id.* at 178. At the same term the Supreme Court further defined the rule to be applied by federal courts as follows:

> A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state

> courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of "general law" and however much the state rule may have departed from prior decisions of the federal courts.
>
> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.
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> *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236-237 (1940) (citation omitted).

See also, Six Companies v. Highway District, 311 U.S. 180, 188 (1940). Thus, before concluding that *Stricklan v. Koella* states the rule of law of Tennessee we must determine whether there is "more convincing evidence of what the state law is" with respect to legal malpractice in the conduct of litigation.

Tennessee clearly recognizes a cause of action for legal malpractice. In fact, the concluding paragraph of the opinion in *Stricklan v. Koella* states, "We do not hold that there generally is no cause of action against an attorney for his negligence or malpractice . . . ." 546 S.W.2d at 814. The Supreme Court of Tennessee stated the rule as follows in *In Re Woods*, 158 Tenn. 383, 13 S.W.2d 800 (1929):

> While an attorney does not guarantee the accuracy of all he does, he is bound to exercise reasonable skill and diligence in attending to business intrusted to his care, and he is bound to possess such reasonable knowledge of well-settled rules of law as will enable him to perform the duties he undertakes. Bills v. Polk, 72

Tenn. (4 Lea) 495; Bruce v. Baxter, 75 Tenn. (7 Lea) 477; Read v. Patterson, 79 Tenn. (11 Lea) 430; Collier v. Pulliam, 81 Tenn. (13 Lea) 114; Hill v. Mynatt (Tenn. Ch. App.) 59 S.W. 163, 52 L.R.A. 883.

"For loss to clients resulting from a want of proper knowledge of matters of law in common use, or of such plain and obvious principles as every lawyer is presumed to know, an attorney is liable, and he is usually held to be liable for the consequences of his ignorance of nonobservance of the rules of the courts in which he practices, or for his ignorance of the statutes and published decisions of his own state." 2 R. C. L. 1015.

158 Tenn. at 389-90, 13 S.W.2d at 803.

The cases cited by the Tennessee Court in *In Re Woods, supra,* and other cases here cited disclose a long-standing recognition of the general rule recognizing a cause of action for legal malpractice. However, none of these cases involved the actual conduct of litigation. *See e.g., Jones v. Smith,* 45 Tenn. 371 (1868) (liability for confessing judgment without authority); *Maxwell v. Owen,* 47 Tenn. 630 (1868) (liability for assigning a debt without permission); *Bruce v. Baxter,* 75 Tenn. 477 (1881) (liability for lack of diligence in collecting claims); *Collier v. Pulliam,* 81 Tenn. 114 (1884) (liability for failure to bring suit upon an account). In *Hillhouse v. McDowell,* 410 S.W.2d 162 (Tenn. 1966), the Supreme Court of Tennessee reversed a circuit court judgment for an attorney in a malpractice action. The legal malpractice claim was founded on the attorney's failure to prosecute his client's personal injury action within the time prescribed by the applicable Tennessee statute of limitations. Though the court based its reversal on a finding that the trial court had applied the wrong statute of limitations to the legal malpractice action,

it made several noteworthy comments on the nature of an attorney's duty to a client. For example, the court quoted from its earlier opinion in *Bruce v. Baxter, supra,* as follows:

> * * * When a person adopts the profession of the law, and assumes to exercise its duties in behalf of another for hire and reward, he must be held to employ in his undertaking a reasonable degree of care and skill; and if any injury result to the client from want of such reasonable care and skill, the attorney must respond to the extent of the injury sustained.
>
> 410 S.W.2d at 164.

Further, the court described the action before it in this language:

> We feel that this suit is based upon an attorney-client relationship of trust, and in addition to being an implied contract it was an express contract that he would exercise reasonable skill and diligence in doing what was undertaken and that when there was a failure to thus exercise such diligence this was a breach of contract rendering the attorney liable for the loss resulting, but no more.
>
> 410 S.W.2d at 166.

It appears that the Supreme Court of Tennessee has not held that an attorney may never be liable for negligence in the conduct of litigation. In view of the inclusive language which that court has used in describing the duty of attorneys to exercise reasonable care and skill in their undertakings for clients we conclude that the district court read *Stricklan* too expansively. The Tennessee Court of Appeals in *Stricklan* described the case thus:

> Essentially and in simple terms, the cause of action stated is that retained counsel refused to use the trial tactics insisted upon by the client, for which refusal retained counsel's services were terminated . . . .
>
> 546 S.W.2d at 812.

After noting cases where the Tennessee courts had recognized a cause of action for legal malpractice, the court of appeals stated, "However, none of the Tennessee cases that we find recognize a cause of action for alleged negligence in the attorney's choice of trial tactics or conduct of the case." *Id.* at 813.

When viewed in light of the general Tennessee rule which holds attorneys liable for losses to clients for failure to exercise reasonable skill and care, *Stricklan* can only mean that there can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment. This is a sound rule.[1] Otherwise, every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second-guess the decisions of the first attorney with the advantage of hindsight. If this were permitted, as Judge Brown pointed out in the present case, the original trial would become a "play within a play" at the malpractice trial. To hold that an attorney may not be held liable for the choice of trial tactics and

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1. Though the court in *Stricklan* relied on the decision in the English case of *Rondel v. Worsley,* reported as (1966) 1 All E.R. 467; (1966 C.A.) 3 All E.R. 657; (1967 H.L.) 3 All. E.R. 993; (1969) 1 A.C. 191, neither counsel nor we have found an American decision holding an attorney liable for the choice of trial tactics or the good faith exercise of professional judgment On appeal the appellees also cited New Zealand cases which have followed *Rondel v. Worsley,* holding that attorneys are immune to suits for "work done in court." *E.g., Bigger v. McLeod,* 1 NZLR 321, 325 (1976).

the conduct of a case based on professional judgment is not to say, however, that an attorney may not be held liable for any of his actions in relation to a trial. He is still bound to exercise a reasonable degree of skill and care in all his professional undertakings.

Leaving aside for later treatment the allegations of conflict of interests, we will examine the plaintiffs' claims of negligence in the investigation, preparation for trial and presentation at trial of their personal injury actions.

(1) FAILURE TO ATTEMPT TO OBTAIN A CHANGE OF VENUE OR TAKE A NONSUIT AND RE-FILE IN FEDERAL COURT. This claim is based on testimony of Charles Woodruff, father of the plaintiffs herein, that he was told that he and his daughters could not get a fair trial in Chester County, Tennessee. Mr. Wocdruff testified that he related this information to the defendant Tomlin and that Tomlin advised him that the case had to be tried in Chester County. The chances of getting a change of venue to another Tennessee circuit court on the basis of this unsubstantiated rumor would be virtually non-existent. An attorney should not be charged with malpractice for refusing to make such a frivolous motion.

The plaintiffs claim, however, that they had moved to Arizona in November 1969 and that Tomlin could have brought the action in a federal court in Tennessee after that time, invoking diversity jurisdiction. It is not at all clear that Tomlin was advised that the Woodruff family had changed its residence to Arizona. In fact, at the second trial in 1971, Joan Woodruff was asked, "Where do you presently live?" Her response was, "Toone—I live in Piney Grove, but on Toone Route." Though the family had lived for two years in Arizona, this reply by a plaintiff who was then 18 years old, indicated her residence

was the same as it had been on the date of the accident. Though Mr. Tomlin conceded in his deposition that if the Woodruffs had actually changed their residence to Arizona an action could have been filed in federal court, he further stated that he regarded the Woodruff family as Tennessee residents. Further, Tomlin testified without contradiction that there was no perceptible pattern of higher verdicts for plaintiffs in the federal courts of West Tennessee than in the local courts of the region.

We conclude that there is no basis in this record for holding that Tomlin's continued pursuit of the plaintiffs' actions in the circuit court of Chester County, Tennessee could be found negligent, or otherwise constitute malpractice. This claim was properly dismissed by the district court.

(2) FAILURE TO OBJECT TO A "CLEARLY ERRONEOUS" JURY INSTRUCTION AND TO PRESERVE THIS ERROR FOR APPEAL. This claim refers to the last clear chance instruction which was given at the second personal injury trial:

> I charge you that if you believe from the evidence that Mr. Pomeroy saw, or by the exercise of reasonable care, should have seen the plaintiffs' vehicle in a position of imminent peril and in danger of being struck by the truck which he was driving, and you find that the defendant, Pomeroy, in time thereafter by the exercise of reasonable care with the means and appliances at hand on his truck, and with safety to himself and to his truck, could have stopped the same or could have decreased the speed of same, or could have diverted the course of same, and thereby avoided the collision, the plaintiffs would be entitled to recover, provided they are not guilty of contributory negligence that proximately caused the accident.

On its face this instruction does appear erroneous, since the doctrine of "last clear chance" only applies to a plaintiff who is negligent, and the final clause of the instruction appears to nullify what went before. Nevertheless, this instruction reflected the Tennessee rule then being followed that a plaintiff may not rely on last clear chance where his own negligence "continues and is concurrent with the negligence of the defendant as a causal factor up to the time of the event which causes harm." *Gardner's Masonry Contractors, Inc. v. St. Louis-San Francisco R. Co.*, 470 S.W.2d 945, 948-49 (Tenn. App.), *cert. denied,* (1971). *Gardner's Masonry* was decided by the Western Section of the Court of Appeals of Tennessee three months before the second personal injury trial of the Woodruffs. This was the court to which an appeal would be taken from judgments of the circuit court of Chester County. Some six months after the Woodruff trial the same appellate court concluded that there was a difference between "last clear chance" and "discovered peril" and that continuing contributory negligence is a complete defense to a claim based on last clear chance, but has no effect on discovered peril. See *Smith v. Craig,* 484 S.W.2d 549, 552 (Tenn. App.), *cert. denied,* (1972).

In *Street v. Calvert,* 541 S.W.2d 576 (1976), The Supreme Court of Tennessee held that the interpretation of last clear chance, discovered peril and "discoverable peril" by the appellate court in *Gardner's Masonry* and *Smith v. Craig,* was erroneous. However, in doing so the court acknowledged that three of its earlier decisions (*Williford, Roe* and *Todd*) "provided some support" for the holdings of *Gardner's Masonry* and *Smith v. Craig. Id.* at 583. The decision in *Street v. Calvert* was rendered nearly five years after the second Woodruff trial.

In view of the confusion surrounding the proper application of last clear chance in Tennessee at the time

of the Woodruff trial we can find no basis for holding that attorney Tomlin could be found negligent for failing to object to the instruction or for failing to urge it as error on appeal to the Western Section of the Court of Appeals of Tennessee. In *In Re Woods, supra,* the Supreme Court of Tennessee cited with approval the decision of the Tennessee Court of Chancery Appeals in *Hill v. Mynatt,* 59 S.W. 163 (Tenn. Ch. App. 1900). *Woods,* 13 S.W.2d at 803. In *Hill v. Mynatt,* the court discussed the responsibility of an attorney in the following language:

> As a matter of fact, law is not an exact science, and, as said in a leading case, "there is no attainable degree of skill or expense at which all differences of opinion or doubts in respect to questions of law are removed from the minds of lawyers and judges." Association v. Friedley (Ind.) 23 N. E. 1075, 7 L. R. A. 669, 18 Am. St. Rep. 320. And if all of us had to go out for mistakes of judgment upon points of new occurrence, or of nice or doubtful construction, it is apprehended that the ranks of the profession, and of judges not final in their jurisdiction, would be decimated at an appalling rate. We recognize and approve the rule attaching liability to the attorney whose client suffers loss on account of his failure to understand and apply well-established principles of law, settled by text-books and cases published long enough for him, exercising reasonable diligence, to have informed himself of them. In other words, an attorney has no right to be a clam, and shut himself up in the seclusion of his own self-conceived knowledge of the law. He must keep pace, so far as reasonable diligence and a fair amount of common sense will enable him to do so, with the literature of his profession, and what the courts have decided. But the law does not require and never has required of a member of the

> profession that he should be a true Sir Oracle of what the courts have decided or will decide as the law applicable to every given state of facts.
>
> 59 S.W. at 167.

This claim was properly dismissed by the district court.

(3) FAILURE TO CONSULT A TRAFFIC RECONSTRUCTION EXPERT. Tomlin did employ an engineer who made measurements at the scene of the accident and prepared a plat. There was no evidence that the accepted standard of performance for Tennessee lawyers requires consultation with a traffic reconstruction expert, or use of such a witness, in highway accident cases. The decision to establish the physical facts of the case by use of an engineer's plat rather than the testimony of an expert appears to be one of trial tactics or judgment as to the most effective presentation of a client's case. Once the distances between objects were established the time/distance factors and stopping distances were simple mathematical computations. In the absence of bad faith, the failure to consult an expert cannot be the basis of liability. *Stricklan v. Koella, supra.* There was no claim of bad faith in this case.

The plaintiffs also complain that Tomlin did not interview or attempt to weaken by cross-examination the testimony of an expert witness who estimated the speed of the Woodruff vehicle, based on the length of skid marks, at 76 m.p.h. Tomlin explained that the witness was a colonel in the State Police Force of Tennessee, whom he knew well, and that he did not believe he could shake his testimony. Instead, Tomlin decided to rely on the testimony of the passenger-plaintiff Joan Woodruff and the driver of the car following closely behind the Woodruff vehicle, Gayle Sterling. Both these witnesses testified positively that Patricia Woodruff was

driving at no more than 55 m.p.h. on a road with a 65 m.p.h. speed limit. This was clearly a tactical decision by Tomlin which would furnish no basis for a malpractice claim under *Stricklan*. This claim was properly dismissed by the district court.

(4) CONCESSIONS IN THE APPELLATE BRIEF. In their brief in the court of appeals the law firm representing the Woodruffs (the brief was written by defendant Waldrop) conceded that there was substantial evidence to support the jury's finding that Patricia Woodruff was negligent in the operation of her father's car. This was clearly so. If the jury believed the expert who testified for the defendants or the defendant Pomeroy it could find that Patricia Woodruff was operating her vehicle at an excessive rate of speed. The brief did not concede that Pomeroy, the driver of the truck which collided with the Woodruff car, was free of negligence. Nor did it concede that Lewis Nobles, the driver of a third vehicle on the highway, was free of negligence.

Tomlin explained the concessions in his testimony. He pointed out the duty of an attorney to be honest with the court. He and his associates felt that there was no basis for reversing the jury's finding of negligence by Patricia Woodruff under Tennessee law. However, since Patricia's negligence was not imputed to Joan, the passenger, it was decided to concentrate on attempting to salvage Joan Woodruff's case on appeal. This consisted of attempting to show that the defendant Nobles was negligent as a matter of law and that Pomeroy was negligent in not beginning to brake his heavy truck until he was virtually upon the stopped Woodruff vehicle. There was support in the record for both of these arguments. Nobles had admitted that he was stopped ahead of the Woodruff car and in its lane of travel and had just started slowly forward before the accident. This was

corroborated by Pomeroy who testified he was unable to pull into the left lane to avoid the Woodruff car after it skidded into his driving lane because of the presence of the Nobles vehicle in the left lane. As to Pomeroy's negligence, the testimony of several witnesses placed him at a point when the Woodruff car began skidding which would have permitted him to stop before reaching the point of collision. Yet, marks in the road indicated that he applied his brakes for the first time immediately prior to the collision.

The decision to concentrate on Joan's case on appeal clearly appears to have been based on professional judgment. By the time of the appeal it was known that Joan Woodruff's injuries were more serious than those of Patricia. By conceding that the jury verdict against Patricia was supported by the evidence, the defendants did not concede anything which would have prevented a new trial for Joan if the court of appeals had "bought" their arguments with respect to the negligence of Nobles and Pomeroy. In fact, the court of appeals did vacate the judgments of Pomeroy and Teague against Joan. It chose to abide by the jury's verdict with respect to Joan's claim against the same two defendants. We conclude that the concessions in the appellate brief resulted from a tactical decision reached in the exercise of professional judgment and do not furnish a basis for a malpractice action. *Stricklan v. Koella, supra.* This claim was properly dismissed by the district court.

(5) FAILURE TO INTERVIEW AND PRESENT AVAILABLE WITNESSES WHO COULD TESTIFY TO IMPORTANT FACTS. Charles Woodruff testified that he told Tomlin, well before trial, that Eugene Burkhead might make a valuable witness. Burkhead was in the woods some distance from the highway. He was conversing with Lewis Nobles who had a loudspeaker in his

car and had called to him. Supposedly Burkhead would have testified that there was a lapse of five to six seconds after the tires of the Woodruff car quit screeching before the crash when the Pomeroy-Teague truck hit it. Such testimony would have tended to support the theory that the Woodruff car had completely stopped in a position of peril with time enough for Pomeroy to have avoided the collision. Tomlin testified he had concluded that since Burkhead was not at the accident scene he possessed no knowledge material to the lawsuit. Tomlin further testified that he had no recollection of ever talking with Burkhead and that he had no written statement from him. There was a statement taken by an insurance adjuster on June 5, 1968 in which Burkhead made no estimate of the lapse of time between the end of the skid and the impact.

Charles Woodruff also testified that he told Tomlin that a family friend, a mail carrier named McClendon, had gone to the scene shortly after the accident and stepped off the Woodruff skid marks. Charles Woodruff's son was with McClendon, and Tomlin was told that both men would testify that the skid marks were 60 paces long, approximately 180 feet. Charles Woodruff testified that he told Tomlin of this evidence during the first trial when an investigating officer testified that the skid marks were 252 feet long. Woodruff said he reminded Tomlin of the existence of this evidence before the second trial. Mrs. Woodruff supported her husband's testimony. Tomlin testified that he never heard of the Woodruffs' son or McClendon until the malpractice action was filed.

Our review of a judgment n.o.v. is governed by the same rule which applies to an appeal from a directed verdict granted at the close of all the evidence. We are required "to view the evidence, as well as all inferences properly deducible therefrom, in the light most favorable

to the plaintiff." *Campbell v. Oliva,* 424 F.2d 1244, 1245 (6th Cir. 1970). A judgment n.o.v. should not be granted "unless the evidence is such that there can be but one reasonable conclusion as to the proper verdict." *Reeves v. Power Tools, Inc.,* 474 F.2d 375, 380 (6th Cir. 1973). While the determination of whether to call a particular person as a witness at trial is a tactical decision involving the exercise of professional judgment, the same cannot be said concerning the failure to interview a potential witness brought to the attention of an attorney by his client. If the persons mentioned by Charles Woodruff were prepared to testify as he believed they would, their evidence would have been material to the issues in the case. Without interviewing them Tomlin had no basis for determining what they would testify to, if called, or for making a judgment as to their effectiveness as witnesses. Failure to follow leads furnished by a client which, if fruitful, would supply significant support for the client's case is not the same as refusing "to use the trial tactics insisted upon by the client. . . ." *Stricklan v. Koella, supra,* 546 S.W.2d at 812. In *Stricklan* the attorney took the depositions of witnesses as requested by the client. However, the attorney concluded that the depositions would be of no use in the trial and did not order them transcribed and filed. This was an exercise of professional judgment which is immune from a claim of malpractice. The situation here was different.

Viewing the evidence in support of this claim in the light most favorable to the plaintiffs, we conclude that an issue was presented which required a determination by the trier of fact. A jury could have believed that failure even to determine the availability, accuracy, and probable effectiveness of these witnesses constituted a failure "to exercise reasonable skill and diligence in attending to business intrusted in his care, ..." *In Re*

Woods, supra, 158 Tenn. at 389, 13 S.W.2d at 803. It was error for the district court to grant judgment n.o.v. as to this claim.

(6) FAILURE TO BRING TO THE ATTENTION OF THE TRIAL COURT CERTAIN TENNESSEE STATUTES AS A BASIS FOR HOLDING THE DEFENDANTS LIABLE. Though he requested instructions on several statutes defining duties of operators of vehicles on public highways, Tomlin did not rely on Sections 59-854 and 59-859 of Tennessee Code Annotated. These statutes make it unlawful to drive a vehicle so slowly as to impede traffic or to stop a vehicle within 200 feet of the crest of a hill. There was evidence that the defendant Lewis Nobles, driver of the vehicle which did not collide with either the Woodruff car or the Pomeroy-Teague truck, was stopped in the highway or was proceeding very slowly as the Woodruff car approached him from the rear. If the jury had accepted this evidence, under proper instructions, it would have been required to find Nobles negligent as a matter of law and would have had to decide only questions of proximate cause and contributory negligence. Though the defendants argued in the trial court and on appeal that Nobles was negligent in blocking the highway in front of Patricia Woodruff, thus setting into motion the chain of events which culminated in her car being struck by the Pomeroy-Teague truck, Tomlin gave no explanation in this action for his failure to urge TCA §§ 59-854 and 59-859 as establishing Nobles' negligence. The arguments on behalf of Joan Woodruff on appeal would have been appreciably stronger if Nobles had been shown to be negligent as a matter of law.

The Supreme Court of Tennessee further held in *In Re Woods, supra,*

> For loss to clients resulting from a want of proper knowledge of matters of law in common use, or of

> such plain and obvious principles as every lawyer is presumed to know, an attorney is liable, and he is usually held to be liable for the consequences of his ignorance or non-observance of the rules of courts in which he practices, or for his ignorance of the statutes and published opinions of his own state.
>
> 158 Tenn. at 390, 13 S.W.2d at 813.

We conclude that it was error to grant judgment n.o.v. in favor of the defendants on this claim.

CONFLICT OF INTERESTS

The jury heard no evidence on the charge of malpractice based on alleged conflict of interests. Nevertheless, the district court included this claim in its judgment n.o.v. We believe the true effect of the court's action with respect to this claim was that it granted summary judgment for the defendants. The issue of conflict of interests was thoroughly covered in pretrial depositions and the District Judge heard evidence on the issue outside the presence of the jury. We will treat the action of the court as the entry of summary judgment on this claim of malpractice.

The alleged conflict of interests arose from the fact that Tomlin undertook to represent Tennessee Farmers Mutual Insurance Company, Charles Woodruff, Patricia Woodruff and Joan Woodruff. The interests of the insurance company, the insured father and Patricia, who was driving with her father's permission, appear to have been identical. The legal rights and obligations of all three, insofar as the consolidated actions were concerned, were the same. Thus this claim is centered on the continued representation of the passenger, Joan Woodruff. As a passenger, Joan had a potential claim against her sister Patricia, which it would have been the duty of the in-

surance company to defend. Though there is a dispute as to whether the policy contained a family exclusion which would have prevented Joan from recovering damages, the policy was never filed in the record. The district court assumed there would have been coverage. 423 F.2d at 1289. The question is what duty was imposed upon the attorney in this situation.

The plaintiffs argue that it was malpractice for Tomlin to continue to represent Joan and that he had an absolute duty to withdraw as her counsel if he continued to represent her sister, her father and his insurer. The plaintiffs' expert, an Arizona attorney, testified to this effect and gave several examples of how the multiple representation would be damaging. So far as this record reveals, Tennessee has no rule which absolutely forbids multiple representation. However, the attorney-client relationship requires an attorney to be alert to potential conflicts and to decline multiple representation when actual conflicts develop. The Tennessee Supreme Court has adopted the Code of Professional Responsibility. Disciplinary Rule 5-105(c), a part of the Code, provides in cases where multiple representation is likely to involve him in representing differing interests, "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation *after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.*" 5A Tenn. Code Ann. p. 119 (1978) (emphasis supplied).

We recognize that the Code of Professional Responsibility "does not undertake to define standards for civil liability of lawyers for professional conduct." 5A Tenn. Code. Ann. p. 89 (1978). Nevertheless, it certainly constitutes some evidence of the standards required of attorneys. *See Annot., Malpractice: Liability of Attorney*

Representing Conflicting Interests, 28 ALR 3d 389 (1969); *Crest Investment Trust, Inc. v. Comstock,* 327 A.2d 891, 904 (Md. 1974); *Lysick v. Walcom,* 258 Cal. App.2d 136, 65 Cal. Rptr. 406, 414 (1968).

It is clear that the defendant Tomlin never advised Charles Woodruff that Joan had a potential claim against Patricia. It appears that Tomlin had no knowledge of a family exclusion which would have prevented Joan from recovering damages under her father's policy, if such exclusion existed. Tomlin testified that both Mr. and Mrs. Woodruff were firm that Patricia was free of any negligence and wanted to protect her from any inference of responsibility. Further, Patricia had no memory of the events surrounding the collision and Joan consistently stated that it was not Patricia's fault. On the other hand, Charles Woodruff testified that he would have permitted Joan to sue Patricia and that he did not know of this possibility until after the trials were over.

Though it appears unlikely that Charles Woodruff would have sought other counsel for Joan if he had known of her potential claim against Patricia, this did not relieve the attorney of his obligation to disclose the differing interests and potential conflict. Woodruff's testimony, which must be taken as true for purpose of this appeal, at least created an issue of fact on the question of conflict of interests. The district court does not appear to have held that there was no conflict in the multiple representation. Rather, it dismissed this claim on a finding that it would be speculation for a jury to find that Tomlin's multiple representation affected the outcome of the trial. 423 F.Supp. at 1289. We think the harm to Joan may be more than a different outcome of the trial of the action against Pomeroy, Teague and Nobles. She may have lost the opportunity for a recovery based on the negligence of Patricia, remote as that possibility may appear.

The speculative nature of the damages disturbed the district court throughout the proceedings in this malpractice action. This is understandable, given the Tennessee rule that a client may only recover from an attorney for malpractice if he shows that "but for" the malpractice he would have been successful in the case in question. A plaintiff's burden was stated as follows in *Gay & Taylor, Inc. v. American Casualty Co.*, 381 S.W.2d 304, 306 (Tenn. App. 1963), *cert. denied*, (1964):

> The burden of proving that damages resulted from the negligence of an attorney, or from his failure to follow instructions, in connection with the prosecution or defense of a suit rests upon the client and usually requires the client to demonstrate that, but for the negligence complained of, the client would have been successful in the prosecution or defense of the action in question. 7 Am.Jur., Attorneys at Law, Sec. 188, p. 156; Anno. 45 A.L.R.2d 21.

Nevertheless, causation is a jury question. *Loftis v. Finch*, 491 S.W.2d 370, 373 (Tenn. App. 1972), *cert. denied*, (1973). The jury could determine, on the basis of expert testimony, whether Joan suffered any injury in fact as the result of Tomlin's failure to advise her father of the potential conflict of interests inherent in his representation of all three plaintiffs and the insurance carrier. A trial of this issue would produce evidence of the actual coverage of the policy (whether there was an exclusion as to Joan) and expert opinion as to whether Joan's case against Pomeroy and Nobles would have been strengthened if she had been independently represented. Such evidence will involve "second guessing." Nevertheless, if the concept of legal malpractice, recognized by the Tennessee courts, is to be more than a mirage, plaintiffs who can produce evidence of negligence or breach of fiduciary responsibility by their attorneys must be given the oppor-

tunity to show that they have been damaged. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). We do not believe that either the holding in *Stricklan v. Koella* or the tenuous nature of the connection between the attorney's acts or omission and financial injury creates an immunity from liability.

Some comment is required on Judge Merritt's dissent. His broadside attack on the court's opinion misstates our holding in several respects.

(1) The court does not hold that T.C.A. §§ 59-854 and 59-859 would clearly apply to the facts of the Woodruff case. What we do hold is that these statutes should have been argued as one basis of the Woodruff claims. The dissent concludes neither would have applied. We merely say that they dealt with highway conduct remarkably like that of Lewis Nobles, and the Woodruffs are entitled to have a jury determine whether Tomlin should have used the statutes as the basis of a specific request to charge the jury and a specific claim of error on appeal. Tomlin never mentioned either statute beyond a reference to § 859 in the original complaint.

(2) The court does not hold that Tomlin was required to call Burkhead and McClendon as witnesses. If he had made an informed decision not to call them, that would clearly have been a tactical decision not subject to question in the malpractice action. However, when an attorney fails even to interview persons whom his client has named to him as potential witnesses in support of his case, the attorney has not exercised professional judgment. He has merely neglected his client's cause. The record does not support the dissent's conclusion that Tomlin made a tactical decision or exercised his judgment with respect to either potential witness. Mr. Woodruff testified positively that Tomlin was told of Eddie Woodruff

and James McClendon both during the first trial and before the second trial. Mrs. Woodruff corroborated this testimony. On a motion for judgment notwithstanding verdict the trial court was required to resolve discrepancies in the evidence in favor of the Woodruffs.

(3) The court does not hold that Joan should have been persuaded to change her story to make out a claim against Patricia. The evidence of breach of duty consisted of Tomlin's failure to advise Joan and her father of the possible existence of a cause of action by Joan against Patricia. All this court holds on the conflict of interests issue is that the plaintiffs were entitled to have a jury determine whether Tomlin's failure to advise his clients fully, in the light of his multiple representation, was legal malpractice.

The dissent implies that the majority is encouraging unethical conduct by suggesting that another lawyer might persuade Joan to change her "consistent claim that her sister was not at fault." Of course, the majority makes no such suggestion. Another attorney, without attachments to Patricia's insurance carrier, might have concluded from Joan's testimony that Patricia was, in fact, at fault. What was important was not whether Joan thought Patricia was at fault, but whether the facts testified to by Joan would indicate legal liability on the part of Patricia. Interestingly, in its restatement of the facts, the dissent says that Joan's testimony demonstrated that "Patsy Woodruff panicked, slammed on the brakes and lost control of her car." A completely neutral lawyer hearing such testimony might conclude that Joan, as a passenger, had a claim against the driver.

Finally, the dissent completely ignores the fact that we are reviewing a judgment notwithstanding verdict. The decision of this court is not that Tomlin was guilty

of malpractice or breach of duty, but that the Woodruffs produced sufficient evidence to have their claims submitted to a jury.

The judgment of the district court is affirmed in part and reversed in part. The cause is remanded for a new trial on the issues of failure to contact potential witnesses identified by Charles Woodruff and failure to rely on the statutes previously referred to, and trial on the issue of conflict of interests. All issues are to be tried together. We express no opinion on the outcome of the trial, but hold that the defendants were not entitled to judgment n.o.v. or summary judgment on these issues.

Costs on appeal are taxed against the defendants-appellees.

WEICK, Circuit Judge, concurring and dissenting in part.

I concur in the reversal of the judgment of the district court and in the remand for a new trial because of errors of the district court in the exclusion of evidence and in granting judgment for defendants n.o.v.

In my opinion, it is not the law of Tennessee as asserted by Tomlin's counsel, that an attorney who is honest and acts in good faith is exempt from liability to his client in a legal malpractice action for damages sustained by the client as a result of the conflicts of interest, negligent or improper conduct of the attorney in the investigation, trial, and appeal of his client's case.

I do not understand that the amicus briefs filed by the bar associations have endorsed any such proposition.

It is not the function of the federal judiciary in a diversity case to innovate by establishing new and untried principles of state law, which the state courts may later repudiate.

If an attorney in Tennessee with a conflict of interest, who is honest and acts in good faith has a privilege exempting him from liability for damages sustained by his client as a result of the attorney's conflict of interest and negligence in handling his client's lawsuit, then a fortiori the same principle of law should apply to a physician who is honest and acts in good faith and negligently performs an operation on his patient which results in injury to or in the death of his patient.

We have applied Tennessee law in holding physicians liable in damages to their patients in medical malpractice cases. *O'Neill v. Kiledjean,* 511 F.2d 511 (6th Cir. 1975); *Campbell v. Oliva,* 424 F.2d 1244 (6th Cir. 1970). In neither of these two cases did the physician have the audacity to contend that he was honest and had a good faith privilege to be exempt from liability. In malpractice cases there is no reason for ever exempting attorneys from liability without extending the same exemption to physicians.

It should not be forgotten that a solemn relationship of trust and confidence exists between an attorney and his client which ought never to be betrayed. The public ought not to be fearful of engaging the services of an attorney who is exempted by law from liability for his misconduct or negligence.

Reliance by the district court on *Stricklan v. Koella,* 546 S.W.2d 810, 814 (Tenn. App. 1976) *cert. denied* by the Supreme Court of Tennessee for such an outrageous proposition was misplaced as we pointed out in the unanimous decision of our panel (Edwards, Chief Judge, Weick and Celebrezze) reported in 593 F.2d 33, 42-44. Even if *Koella* supported the erroneous decision of the district judge, which it does not, we would not be required to follow it, because it would be contrary to decisions of

the Supreme Court of Tennessee and Tennessee appellate decision as we pointed out and is not supported by any American decisions.

I agree also with the majority that the district court erred in holding that the harm done to plaintiffs was "sheer speculation" and therefore beyond the province of the jury. There was abundant evidence of negligence, improper practice and of expert testimony on causation. A factual question existed for determination by the jury and not by the district court.

Conflict of Interest

The record is clear, as we pointed out in our panel decision, that the insurance company was obligated under the provisions of its policy, to defend its insured Woodruff and his two daughters in the suits filed against them in the state court, by Teague for damages to his truck and by Pomeroy for personal injuries alleged to have been sustained by him in the collision as a result of the negligence of Patricia, the driver and Joan, the passenger in the automobile.

Woodruff, on the other hand, had a claim for damages to his car against Teague, Pomeroy and Nobles. Woodruff's two daughters Joan, age 15 and Patricia, age 16, had substantial claims against Pomeroy, Teague and Nobles for terrible personal injuries sustained by the two girls as a result of the negligence of the two truck drivers in impeding traffic in both lanes of the public highway.

Leathers, the insurance adjuster, solicited all of these claims for Tomlin. He told Woodruff that he should have an attorney, that the statements of the witnesses were inconsistent and were changing. Undoubtedly the purpose of the solicitation was to help the insurance company in the defense of the suits which Pomeroy and Teague were

about to bring against the two girls for personal injuries sustained by Pomeroy and property damage sustained by Teague. Leathers recommended to Woodruff that he engage Tomlin to represent his two minor daughters, Joan and Patricia.

Acting on Leathers' recommendation, Woodruff did consult with Tomlin and retained him to represent his two daughters. Leathers was not bound by any ethical considerations but Tomlin, as an attorney at law, was bound by the Canons of Professional Ethics of the American Bar Association, particularly Canons 6 and EC5-14 and EC5-15 set forth at length in our panel decision (593 F.2d 39, 30) which had been adopted by the Supreme Court of Tennessee in 185 Tenn. 889.

As we pointed out in our panel decision, the Canons required Tomlin to disclose to his clients at the time of the retainer "all the circumstances of his relations to the parties and any interest in or connection with the controversy which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests except by express consent of all concerned given after full disclosure of the facts. Within the meaning of this Canon, a lawyer represents conflicting interests when it is his duty to contend for that which duty to another client requires him to oppose." (Opinions on Professional Ethics, p. 22), See DR5-105, EC5-14, EC5-15, Volume 5A Tennessee Code Annotated Pages 115 and 119, 185 Tenn. 889.

Tomlin at the time of his retainer never discussed with his clients *any* of the circumstances of his relation to the parties and *any* interest in or connection with the controversy which might influence the clients in the selection of counsel. He never told Joan that she had a claim

against her sister Patricia and that the investigation of the insurance adjuster indicated that the statements of witnesses were conflicting. When suits were filed in the state court by Tomlin against Teague, Pomeroy and Nobles in behalf of Joan and Patricia to recover damages for their serious personal injuries and separate suits were filed in the state court by Pomeroy and Teague against the two girls for personal injuries sustained by Pomeroy and damages to Teague's truck allegedly caused by the girls' negligence, Tomlin never advised them that he had a conflict of interest and that Joan should retain separate counsel. The girls and their father were never informed by Tomlin as to their rights and hence could not have given an informed consent to Tomlin's representing them. These suits were all consolidated for trial in the state court.

The failure of Tomlin to advise his clients of their rights and his conflict of interest, his failure to advise Joan and her father that Joan should obtain separate counsel, and his failure to withdraw from the case when the conflict became very obvious to him is responsible for most of the damages resulting to Joan, Patricia and her father as a result of Tomlin's misconduct and negligence.

The fact that Tomlin was honest and was acting in good faith, as he claims, did not give him a license to violate the ABA Canons of Professional Ethics as adopted by the Supreme Court of Tennessee or authorize him to represent clients when he had conflicts of interest which he never disclosed to his clients.

There is Tennessee authority on this subject directly in point. In *Holcomb v. Steele,* Tenn. Ct. of Appeals, 342 S.W.2d 236 (1958), *cert. denied,* by Supreme Court of Tennessee, June 5, 1959, a firm of attorneys undertook

to represent both the driver and the passenger of an automobile in an action against the driver of another car for personal injuries arising out of an automobile collision between the two automobiles. The firm of attorneys neglected to advise the passenger of her rights to sue her driver and even recommended that she accept a $400 settlement of her claim against the other driver. The passenger discharged the firm of attorneys she had originally engaged and employed another lawyer who filed suit against both drivers in behalf of the passenger and her husband and recovered a compromise judgment of $3000 against the other driver and $3000 against her driver, and $4000 against both drivers were awarded in favor of the passenger's husband. The firm of attorneys originally employed then intervened in the case asserting that their client had no lawful right to discharge them as attorneys and prayed for a lien on the proceeds of recovery for their 50 percent contractual attorneys fee.

The appellate court found that the firm of attorneys were negligent in their handling of the passenger's case by not suing her driver and breached their duty to properly advise their client of her rights against her driver. The court denied attorney's fees to the firm of attorneys.

The Court of Appeals stated:

> The negligence of petitioner (the firm of attorneys) and breach of their duty to properly advise and represent Mrs. Holcomb was a breach of their contract of employment and a bar to their right to recover the attorney's fees sued for. P. 244.

In New Jersey, the Supreme Court issued a directive:

> "The Supreme Court is of the view, because of the conflict of interest inherent in the situation, that an attorney should not represent both the driver of a

car and his passenger in an action against the driver of another car, unless there is a legal bar to the passenger suing his own driver, as, for example, where they are husband and wife, unemancipated child and parent, or employees of the same employer and the accident occurred in the course of their employment. Where an attorney does represent both a driver and his passenger and no such legal bar exists, if a cross-claim or counter-claim is made by the other driver, a conflict of interest arises and the Supreme Court has advised the Assignment Judges that the attorney should not be permitted to continue to represent either the driver or his passenger." 91 N. J. L. J. 68 (Feb. 1, 1968) And see *Weinberg v. Underwood*, 101 N. J. Super. 448, 244 A. 2d 538 at 540 (1968).

In the present case, a conflict surely existed because Pomeroy and Teague had cross-claimed against the two girls for damages, for personal injuries and damages to the truck.

If Joan had been represented by separate counsel, without any conflict of interest and had included her sister Patricia as a party defendant in her suit in the state court against Teague, a Pomeroy and Nobles, the jury could not very well have returned a verdict against Patricia in favor of Teague and Pomeroy based on Patricia's negligence without also returning a verdict in favor of Joan against Patricia. As a matter of fact, it would have changed the complexion of the entire case and could have resulted in a verdict against both truck drivers who were blocking both lanes of the highway.

The district judge in a pretrial conference, ruled that in a malpractice action against an attorney, a claim for conflict of interest could not be joined in the malpractice claims of negligence against the attorney in his preparation,

conduct of the trial and appeal of the case. The district judge stated:

> In any case, it appeared that this claim based on the alleged conflict of interest on the part of defendant Tomlin should not be tried with the claims of negligence in losing the lawsuits and therefore it was by pretrial order, not dealt with at the trial.

This ruling was clearly erroneous. In the unanimous panel decision we stated:

> The District Court cites no authority for such a proposition. This was a legal malpractice case. If conflict of interest should not be dealt with in a malpractice case, where should it be dealt with?
>
> Malpractice is defined in Webster's New World Dictionary of the American Language, College Edition, with respect to persons other than physicians, as:
>
> 2. Misconduct or improper practice in any professional or official position.
>
> Negligence of an attorney in the investigation, trial, and appeal of his client's case is certainly improper practice in his professional capacity; it is malpractice. It is also malpractice for an attorney to represent parties with conflicting interests, without his disclosing all facts to his clients and obtaining their consent.
>
> 593 F. 2d 39

We further stated:

> When the District Judge, in a pretrial conference, ruled that conflict of interest could not be considered in a legal malpractice case where negligence was also alleged, the plaintiffs petitioned our Court for a writ of mandamus and prohibition to obtain relief from this error.

> In an order entered July 8, 1976, we held that no appeal lies from an interlocutory order except by leave of court, and that mandamus is an extraordinary remedy and can not be used as a substitute for an interlocutory appeal. *Woodruff v. Honorable Bailey Brown*, No. 76-1892, Court of Appeals, 6th Cir.
>
> During the trial in the District Court plaintiffs again raised the conflict of interest issue and proffered proof which the District Court rejected, and declined to submit the issue to the jury, and finally dismissed the complaint when it granted judgment n. o. v.
>
> In this direct appeal we now have jurisdiction to hear and to determine the issue of conflict of interest.
>
> In our opinion it was prejudicial error for the District Court at its pretrial conference to separate and remove the issue of conflict of interest from other issues of malpractice, and to deny the admission of relevant evidence with respect thereto at the trial, and to decline to submit the issue to the jury for determination. If the issue of conflict of interest has been submitted to the jury it could have produced a different result.
>
> 593 F. 2d 40-41

The majority opinion agrees that it was prejudicial error for the district judge to separate from and decline to try the issues of conflict of interest with the other malpractice issues in the case.

The Erroneous Instruction On Last Clear Chance

The state trial judge in the second trial ruled that there was sufficient evidence of last clear chance to submit that important issue to the jury but unfortunately he gave a clearly erroneous instruction which operated to

defeat the plaintiffs' case because he stated that "the plaintiffs would be entitled to recover, provided they are not guilty of contributory negligence that proximately caused the accident."

Where the doctrine of last clear chance is applicable the plaintiffs are in a position of peril. There negligence had ceased. The defendants saw the plaintiffs in a position of peril and in the exercise of ordinary care could have avoided the accident but the defendants neglected to exercise such ordinary care. Contributory negligence of the plaintiffs was no longer an issue in the case and the court should have so instructed the jury.

Tomlin, as an insurance lawyer engaged in the defense of personal injury cases must certainly be presumed to know the Tennessee law on the issue of last clear chance, yet he made no objection to the erroneous instruction or request to the state trial judge to change the instruction to conform to Tennessee law. Nor did he assign the erroneous instruction on last clear chance as error in the motion for a new trial which he filed.

In our panel decision we stated:

> This instruction was clearly erroneous. Under the doctrine of last clear chance plaintiff's contributory negligence had ceased. It was no longer a proximate cause. The defendant saw the plaintiff in a positive of peril in sufficient time that he could have averted the collision had he exercised ordinary care.
>
> The instruction of the trial court defeated the entire purpose of the doctrine. It conflicted with a decision of the Supreme Court of Tennessee in *Vaughn v. City of Alcoa,* 194 Tenn. 449, 251 S.W.2d 304 (1952). It also conflicted with our decision applying Tennessee law in *Smith v. Beattie,* 346 F.2d 139 (6th Cir. 1965).

It is argued that the erroneous instruction is supported by an appellate decision in *Smith v. Craig,* 484 S.W.2d 549 (Ct. App. Tenn., *cert. denied* August 7, 1972). The Supreme Court of Tennessee repudiated *Smith v. Craig, supra,* in *Street v. Calvert,* 541 S.W.2d 576 (1976).

The trial judge, in giving the erroneous instruction, was bound by the decision of the Supreme Court of Tennessee in *Vaughn v. City of Alcoa, supra,* rather than by an erroneous decision of an inferior appellate court.

Tomlin did not ever object to the erroneous instruction in the state court trial, nor request the court to change it. He did not assert it was error in a motion for a new trial filed in the state court, nor did he assign it as error in the state court of appeals.

Tomlin's partner prepared the appellate brief. The partner did not assign as error the erroneous instruction on last clear chance because Tomlin had not included it in his motion for a new trial. Had it been assigned as error the state court of appeals would have had an opportunity to rule on the issue. If the state appellate court had decided against Tomlin on the issues, Tomlin could have petitioned the Supreme Court of Tennessee for certiorari where the rule announced in *Street v. Calvert,* 541 S.W.2d 576 (1976) would have controlled and a new trial for both Patricia and Joan would have resulted.

Failure To Call Witnesses

I agree with the majority opinion. I would, however, add to the majority opinion failure of Tomlin to call a reconstruction expert; failure to interview or take the deposition of Col. Dawson, a state police officer who was defendant's expert witness. In my opinion, Tomlin's excuse that it would be unethical is without legal support.

In the malpractice trial, Tomlin called as expert witnesses two judges of the state trial courts, one state Court of Appeals judge, and two attorneys to help him out. A state judge had participated in the trials and the appellate judge had written the opinion for the Court of Appeals. Tomlin thus recognized the value of the expert testimony in defending himself and he should have used expert testimony for the benefit of his minor clients in the trials in the state court.

It is obvious that the cases of the two girls were very poorly tried by Tomlin in the state court.

Negligence In Conducting Appeal

In addition to Tomlin's failure to appeal the issue the erroneous instruction on last clear chance, Tomlin and his law firm made erroneous and damaging concessions against the interest of their clients which operated to prevent Tomlin from petitioning the Supreme Court of Tennessee for certiorari.

These admissions as stated by the Court of Appeals were:

> In short, the fact is that there is material evidence in this record from which the jury could have concluded that Patricia Woodruff was guilty of negligence. This fact is conceded in appellants' brief and it is therein admitted that neither of the plaintiffs in the original cases of Patricia Woodruff vs. Nobles, Pomeroy and Teague, and in Charles Woodruff vs. the same defendants can now prevail.
>
> [App. 162-63]

If Tomlin and his law firm had appealed to the state court of appeals the issue concerning the erroneous instruction on last clear chance, a new trial would have been

granted either by the state court of appeals or by the Supreme Court of Tennessee to both Patricia and Joan. *Street v. Calvert, supra.*

Furthermore, since it was prejudicial error to eliminate the issue of conflict of interest, the entire case should be remanded for retrial as the majority has held.

Failure To Bring To The Attention Of The Trial Court Applicable Tennessee Statutes Relative To Rules Of The Road

I agree with the majority opinion on this issue.

Failure To Attempt To Obtain Change Of Venue

I disagree with the majority opinion on this issue. After the first trial in the state court resulted in a mistrial due to a "hung" jury, one of the jurors advised Mr. Woodruff that he could not get a fair trial in Chester County. Woodruff reported this to Tomlin who gave him incorrect advice. Tomlin could have dismissed the plaintiffs' cases in the state court without prejudice and refiled in the federal court.

An incident took place in the second trial in the state court which reveals the wisdom of the advice given by the juror to Mr. Woodruff, namely, a claim of tampering in the second state court trial with a juror by the defendant Nobles who offered to permit the juror to use his (Nobles) farm for coon hunting.

Conclusion

The two girls have been subjected to two trials of their lawsuits in the state circuit courts and one appeal to the state court of appeals. In the federal court their malpractice suit was erroneously dismissed by the district judge on the ground it was barred by the state statute of

limitations. We reversed and remanded for trial. *Woodruff v. Tomlin,* 511 F.2d 1019 (6th Cir. 1975). On remand the district judge erroneously held that conflict of interest claim against Tomlin could not be joined with other grounds of malpractice such as negligence. Woodruff petitioned this court for a writ of mandamus which we dismissed on the ground that no appeal could be taken from the pretrial order as it was an interlocutory order; that mandamus was an extraordinary remedy and could not be used as a substitute for appeal. *Woodruff v. Honorable Bailey Brown,* No. 76-1892, Sixth Circuit Court of Appeals.

As before pointed out, the plaintiffs in the district court were denied the use of a wealth of relevant and competent evidence tending to prove conflicts of interest and negligence of Tomlin. Even without such evidence, the jury disagreed and the district judge then granted judgment n. o. v. in favor of Tomlin erroneously as is held in the majority opinion. If the erroneously excluded evidence had been admitted, an entirely different result could have been obtained.

It is a travesty that these young girls horribly injured in 1968 by reason of the negligence of truckers impeding traffic on the public highways have not obtained justice. Their failure to obtain justice, as has been pointed out, is due to the improper handling of their cases by their lawyers and a jury should now be permitted to decide the issues of fact with all the evidence admitted which was previously erroneously excluded.

ENGEL, Circuit Judge, dissenting.

Because I believe that the majority has departed from the admonitions of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), to substitute its judgment for what is plainly the law of Tennessee, I must respectfully join Judge Merritt in his dissent.

In my opinion, the trial judge correctly held that *Stricklan v. Koella,* 546 S.W.2d 810 (Tenn. Ct. App. 1976), compelled the directed verdict. Clearly, the Tennessee Court of Appeals, in deciding *Koella,* directly relied upon the rationale of *Rondel v. Worsley,* (1966) 1 All E.R. 467, (1966 C.A.) 3 All E.R. 657 and (1967 H.L.) 3 All E.R. 993, which expressly held that clients had no action against a lawyer for negligence in the conduct of the case in court. If the Tennessee courts choose to repair to English law for guidance, our court should not interfere. They have a right to seek wisdom where they can find it. One of the glories of our federal system is its ability to tolerate a wide variety of legal experience, even at the expense of foregoing the advantage of uniformity throughout the several states.

The majority opinion, in a scholarly and highly intelligent way, seeks to reconcile *Koella* with the general law of malpractice observed in Tennessee and elsewhere throughout the United States. In my opinion, however, the end result simply is to rob *Koella* of all of its substantive meaning as a rule of law governing the liability of attorneys with respect to their conduct of their client's case in the state's courts. Right or wrong, the intention of *Koella,* as indeed of *Rondel,* was to remove altogether from the jury's consideration evaluations of the conduct of attorneys based solely upon negligence. For all practical purposes, the majority opinion reduces the issue decided in *Koella* to a question of semantics. I do not think this is the intent of the Tennessee courts.

While I generally subscribe to the views expressed by Judge Merritt in his dissent, I have one reservation. I am not at all certain that the limited immunity conferred by *Koella* extends to that conduct of an attorney which is basically investigative in nature. Nearly every activity which an attorney undertakes and which is subject to the

usual laws of legal malpractice in Tennessee and elsewhere will involve investigation both of the law and of the facts. It may also pose the potentiality for ending up in litigation if a resolution of difference is not amicably reached. I am reluctant to hold, therefore, that this investigative activity is within the limited immunity of *Koella* in the absence of some definitive statement to that effect from the Tennessee courts. In my view, we need not reach this legal issue because even under the majority's more liberal view, the testimony which might have been elicited from neglected witnesses is not sufficiently different from that already on the record to warrant a reversal and remand for a new trial on that account. There may indeed have been a factual dispute between the testimony of these witnesses and of the police officer, but in my opinion that dispute was not material and would not have affected the outcome of the case.

That the Tennessee Bar Association has filed an amicus brief strongly supporting the district court opinion can perhaps be charged to the special interest of the state's legal community in avoiding an expansion of its professional liability. I cannot however, so easily dismiss the fact that both active judges on our court from Tennessee, one of whom tried the case, are of like mind. We have repeatedly accorded considerable weight to the interpretation of state law made by the federal judges who are located in that state and who, therefore, are possessed of a greater sensitivity to the state's interpretation of its own laws. *Lenoir v. Porters Creek Watershed District,* 586 F.2d 1081, 1093 (6th Cir. 1978). *See also Martin v. University of Louisville,* 541 F.2d 1171, 1176 n.7 (6th Cir. 1976), and cases cited therein. The Supreme Court has stated that:

> In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of par-

ticular states unless their conclusions are shown to be unreasonable.

Propper v. Clark, 337 U.S. 472, 486-87 (1949), cited with approval by Mr. Justice Stevens in *Bishop v. Woods,* 426 U.S. 341, 346 n.10 (1976).

MERRITT, Circuit Judge, dissenting. I find the opinion of the Court unsatisfactory for two reasons. First, the Court erroneously concludes that the standard of liability for a lawyer engaged in litigation in Tennessee courts is one of ordinary negligence. This conclusion directly conflicts with the law as declared by Tennessee courts. Second, even if ordinary negligence were the standard under Tennessee law, the Court's application of that standard to the facts of this case is unacceptable.

I.

Stricklan v. Koella, 546 S.W.2d 810 (Tenn. Ct. of Appeals, 1976), is the only reported Tennessee case which decides, or even discusses, the liability of a lawyer in the conduct of litigation. There the complaint alleged that the lawyer, in advance of trial, did not take three depositions as instructed by his client. The complaint did not allege bad faith but rather stated that the lawyer's preparation for trial was negligent, "unprofessional" and "unskilled."

After quoting from the portion of the complaint which asserts a negligence theory, the Tennessee Court of Appeals said: "[w]e hold that there can be no such cause of action in this state." *Id.* at 812. The Tennessee Court then acknowledged that "ordinarily a lawyer, like a physician, is liable for professional negligence," but stated that entirely different considerations apply to "a cause of action for alleged negligence in the attorney's choice of trial tactics or conduct of the cause." *Id.* at 812-13. As explained by the Tennessee Court, these considerations are as follows: (1)

in litigation a lawyer has a different responsibility than in other legal matters, "a duty to the court which is paramount"; (2) the special nature of trial practice creates pressures, delays, strategems and lapses which the layman or "the client does not know" and understand and may "[t]o him . . . indicate incompetence or negligence"; (3) "the possibility of being sued for negligence would at least subconsciously lead some counsel to undue prolixity [or defensive rather than vigorous and creative advocacy], which would not only be harmful to the client but against the public interest"; (4) a lawyer should not be held responsible for negligent errors and omissions in a case decided by a jury because "only by pure guesswork can the verdict of a jury be examined and a so-called cause for that verdict be determined." *Id.* at 813. The Court then concluded "that for the reasons given, there can be no cause of action [for negligence] against an attorney arising out of the manner in which he honestly chooses to present his client's case to the trier of the facts." *Id.* at 814.

One may or may not agree with the policies enunciated by the Tennessee Court, but it has declared the current applicable standard of liability in Tennessee. It is not a negligence standard but a standard based on the "honesty" or "good faith" of the lawyer in the presentation of the case.

It is important to emphasize that under this standard the trial lawyer is not absolutely immune from civil liability for wrongful conduct, as are judges and prosecutors under federal law. Tennessee law gives the trial lawyer only a qualified privilege or immunity. Like the standard applicable to certain officials under federal law, see *Butz v. Economou,* 438 U.S. 478 (1978), the Tennessee trial lawyer is civilly liable only for wrongful conduct that amounts to bad faith.

It is not unusual that this should be the standard. Under *New York Times v. Sullivan,* 376 U.S. 254 (1964),

journalists who exercise public responsibilities under the first amendment are liable only for "malice" or the "reckless disregard" of the rights of others, not for negligent investigation, misstatement, omission or conflict of interest. They are given a qualified privilege, based on honesty and good faith, because of the nature of their work. There are other fields of law in which courts have devised ways to limit the liability of a person employed to exercise his trained judgment. For example, the public official and the corporate director are not liable for negligent mistakes in the exercise of discretion in making decisions. They are given a qualified privilege based on good faith. *See* Wade, *A Survey of the Law of Legal Malpractice*, 32nd Ann. Proc. Miss. L. Inst. 49 (1978).

Trial lawyers have functions to perform similar to those of the journalist. When representing clients in court, they perform important duties referred to in the Constitution. The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense," and the Seventh says that "in suits at common law . . . the right of trial by jury shall be preserved." Like journalists who cover public affairs, trial lawyers perform these functions in a heated, disputatious and highly competitive environment under strict deadlines and severe pressures. The search for truth is difficult and controversial. The trial lawyer's role is often misunderstood. When he presses his advantage too far, fails to press it far enough, or presses it just the right amount, someone may be injured and want to sue him for wrongful conduct. When he wins or when he loses, when the verdict is too small or too large, the lawyer is open to criticism and suit. A disgruntled party may believe that his lawyer or his lawyer's adversary unfairly caused the harm. The Tennessee Court cites these and other strong policy reasons for limiting the

liability of lawyers engaged in litigation. My brothers simply pay no attention to the Tennessee Court's holding or to its reasons.

In addition, the Court gives no consideration at all to the Tennessee Court's discussion of proximate causation and fails entirely to analyze this issue. Should the members of the original jury and the trial judge have been called and asked to speculate upon the outcome of the case if the lawyer had followed the different strategy now advocated by the Woodruff family? The Court makes no effort to discuss this problem at all or give any guidance to the District Court in the trial of the case upon remand.

The Tennessee Court said: "Putting it as simply as we can, there is no way on God's green earth that any one man, any twelve men, or any twelve hundred men, can tell with one iota of certainty how another man or jury would have decided a case if such and such had been said or done or had not been said or done. . . ." There was no reliable proof on the subject of proximate cause in the court below. The Woodruff family did not attempt to prove a casual relationship between the lawyer's conduct and the plaintiff's damage. They should not be able to recover unless they prove that the jury would have reached a different verdict had the lawyer conducted the case differently. We should not remand the case for a new trial when the element of causation is entirely absent.

II.

Even if ordinary negligence were the standard of liability, a fair analysis of the facts shows that the lawyer was not guilty of negligence in marshalling and presenting the case to the trier of fact.

Except for the severity of the injuries to the Woodruff sisters, this was not an unusual automobile accident case.

Similar accidents have occurred and similar cases have been tried many times.

The Woodruff sisters' automobile was traveling West in a rural area of West Tennessee on a two lane, paved road, divided by a center line. Coming from the opposite direction in the eastbound lane was the heavily loaded tractor-trailer truck of James Pomeroy. The sisters topped a hill and saw the automobile of Lewis Nobles approximately 300 feet in front of them traveling in the same direction in the same lane. The Nobles automobile was stopped or traveling very slowly in preparation for a left turn across the road.

As demonstrated by the testimony of Joan Woodruff on page 61 of the transcript of the original trial, Patsy Woodruff panicked, slammed on the brakes and lost control of her car. Her car skidded some 250 feet into and across the wrong lane of traffic so that the front of her car headed South and the back end protruded onto the highway blocking a portion of the eastbound lane of the road. Nobles had seen the Woodruff car in his rear view mirror as it topped the hill and decided to abort his turn and drive forward in order to clear the road for the oncoming car.

Pomeroy, the driver of the truck, was also faced with a quick decision. The Nobles car was in the opposite lane, and the Woodruff car was skidding towards him in his lane of traffic. Pomeroy pulled his truck off the road onto the right shoulder and applied his brakes. The Woodruff car, however, came all the way across the road and blocked the shoulder of the road on Pomeroy's right; the back end protruded onto the road in Pomeroy's lane of traffic. When Pomeroy saw he could not avoid the Woodruff car by pulling off the the road to the right, he cut back to the left. The front end of Pomeroy's truck crashed into

the rear right side of the Woodruff car. Immediately after the crash Pomeroy faced yet another car coming in the westbound lane driven by Gayle Sterling. In order to avoid a head-on collision he cut back to the right missing her car completely.

The officer who investigated the accident testified that the Woodruff car laid down 252 feet of skid marks. This evidence, together with the driver's loss of control, indicates that the Woodruff car was traveling at a high rate of speed. Other testimony showed that the Woodruff girls were in a hurry to get home and had just passed another car going approximately 50-55 miles an hour. (Or. Tr. pp. 9, 36, 68.)

Based on these facts, the jury reached a logical conclusion. They concluded that the accident was caused by the negligent failure to the driver of the Woodruff car to keep her car under control. Were we reviewing the jury verdict on direct appeal, we would find no difficulty in sustaining the verdict below.

The majority opinion of our Court suggests that the result would have been different had the lawyer relied on T.C.A. §§59-854 and 59-859. Apparently, the Court overlooked the fact that the lawyer did rely on § 59-859. The statute is clearly set out in the original complaint page 8, but the transcript of the trial at page 521 shows that the trial judge refused to include it in his charge to the jury.

Neither § 854 nor § 859 is applicable to the facts of this case. Section 854(a) provides:

> No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law.

Nobles was entitled to slow his car down at the bottom of the hill in order to turn left. Section 854 does not apply to prohibit a driver from slowing or stopping his car in the face of oncoming traffic in order to make a turn. The record shows that Nobles intended to turn left onto Murdock Road. On pages 340-41 and 451 of the trial transcript, Pomeroy and Nobles testified that Nobles' left turn signal was blinking. The Court's argument that the statute may be used to establish negligence *per se* on the part of Nobles simply will not stand analysis. Such an instruction by the state trial court would have been error.

Likewise, § 859 is inapplicable:

> Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled part of the highway when it is practicable to stop, park or so leave such vehicle off such part of said highway . . . and a clear view of such stopped vehicles shall be available from a distance of two hundred (200) feet in each direction upon such highway.

The facts demonstrate that Nobles had not parked his car on the highway but was slowing down to turn left. In addition, there is no proof that "a clear view" of Nobles' car was not "available from a distance of two (200) hundred feet." There was testimony throughout the record that it was between 300 and 330 feet from the crest of the hill to where Nobles' car was stopping to turn left. (Trans. of original trial p. 368.) In fact, the Woodruffs' own expert witness in the malpractice trial testified that the distance was some 300 feet from the crest of the hill to Murdock Road (Trans. of malpractice trial pp. 524-25.)

These two statutes are, therefore, inapplicable to the situation at hand, and under no reasonable interpretation

can the lawyer for the Woodruff family be said to be derelict in failing to insist that Nobles violated these two statutes.

The Court is also in error when it concludes that Tomlin's failure to interview three witnesses, Burkhead, Maclendon and Eddie Woodruff, should have gone to the jury on the issue of negligence.

The transcript of the malpractice trial at pages 741-42 shows that an investigator did interview Burkhead and furnished his statement to Tomlin. Although Burkhead did not see the accident, he said in the statement that based on noises he heard coming from the scene of the accident, he believed that the Nobles car moved forward before the accident occurred. Tomlin concluded on the basis of the statement that Burkhead's testimony would not be helpful. It conflicted with plaintiffs' theory that Nobles' automobile remained stationary in front of the Woodruff automobile, thereby creating a hazard. The lawyer concluded that interviewing Burkhead would serve no purpose. This appears to be the kind of tactical decision or exercise of judgment that should not go to the jury even under the standard advocated in the majority opinion.

Tomlin testified that he did not interview the two other witnesses, Maclendon and Eddie Woodruff, because he did not know of their existence. The father and mother of the girls testified that they told Tomlin during the first trial that these two witnesses could give helpful testimony rebutting the testimony of Lieutenant Melton, a Tennessee Highway Patrolman of many years experience. Officer Melton had investigated the scene of the accident immediately after it occurred. He testified that he measured the length of the skid marks behind the Woodruff car. They measured 252 feet. Mr. and Mrs. Woodruff testified that they told Tomlin that the two witnesses would testify

that they had gone to the scene of the accident and measured the skid marks to be considerably less than the distance stated by Officer Melton. Tomlin simply denied that anyone had told him that these two witnesses could so testify.

This conflict does present a credibility issue, but there is no proof or reason to believe that the jury would have disbelieved the testimony of Officer Melton or that Tomlin's failure to interview and call these two witnesses changed the outcome of the trial. The element of causation is missing. The witnesses were closely identified with the Woodruff family and had an interest in the outcome. Officer Melton was a neutral witness who testified that he measured precisely the length of the skid marks. It is pure speculation to say that the jury would have discredited his testimony. In order to send the case to the jury, there must at least be some reliable evidence on which the second jury could find a probability that the first jury would have reached a different verdict had the lawyer interviewed and called the witnesses.

On the so-called "conflict of interest" issue, there is a short answer. Had Joan, the passenger, decided to sue her sister, Patsy, the driver, she would have recovered nothing. The family's automobile liability insurance policy apparently contained an exclusion disallowing recovery by family members. Even if Joan had obtained a verdict against Patsy, there would have been no insurance funds to pay the judgment. How can the lawyer be liable for failing to advise Joan Woodruff to sue her sister when such a suit would have profitted her nothing?

Moreover, the majority opinion is remarkably silent on the subject of Joan's consistent claim that her sister was not at fault. (See pages 8 and 38 of transcript of original trial.) Should another lawyer have been called

in to try to persuade Joan to change her story to make out a claim against Patsy? Before my brothers condemn the lawyer, they should at least consider the ethical implications of such a course of conduct.

Lastly, and most important, the girls' legal guardian, the father, as a moral man, would not have consented for these injured girls to sue and testify against one another and thereby run the risk of lasting damage to the emotional stability of his children and the harmony of his family. As admitted by the court, the record shows that Mrs. Woodruff did not want Patricia to feel that she was responsible for Joan's injuries (Deposition of Lila Woodruff, p. 11). Charles Woodruff stated that he never thought Patricia caused the injury to Joan (Deposition of Charles Woodruff, p. 25) and both testified that they were a close family (trans. of original trial, pp. 157, 259). There was testimony by Charles Woodruff, Lila Woodruff and Louis Hamilton, Patricia's husband, that, after the accident, Patricia had a drastic personality change. She became depressed, defensive and had a short breaking point (*Id.* at 158, 260). She asked her father if she was at fault and had caused the accident (*Id.* at 156). Patricia also began doing poorly in school. She eventually had to drop out because of her inability to concentrate. If Joan had, in fact, brought suit against her sister Patricia, what would that have done to Patricia's state of mind?

Thus, there was no real conflict of interest between Joan and Patsy Woodruff. The issue is purely imaginary. Joan did not want to sue Patsy. She would have recovered nothing if she had. It would have been a stupid thing to do.

In closing, it should also be pointed out that the whole Woodruff family testified that they felt Hewitt Tomlin had done a commendable job and, in fact, thanked him for a "job well done." (See depositions of Lila, p. 13,

Charles, p. 63, Joan, p. 55, and Patricia Woodruff, p. 9, respectively.) It was not until Charles Woodruff talked to the Arizona lawyer, Norman Herring, that he concluded Tomlin had not done a satisfactory job (Dep. pp. 54 & 60.) For our Court to permit this lawyer to continue to be harassed in this way is unjust.

For these reasons, I would affirm the judgment of the District Court directing a verdict for the defendant.